Supreme Court, U.S.
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In the
Supreme Court of the United States
October Term, 1993

DOCTOR NUI LOA PRICE, AKA MAUI LOA, individually and in the capacity of Chief of The Hou Hawaiians; THE HOU HAWAIIANS, a native Hawaiian Ohana; and KAMUELA PRICE, individually and in the capacity of member of the Elder Council of The Hou Hawaiians,
Petitioners,

v.

MOANIKEALA AKAKA; ROD BURGESS; CLARENCE CHING; FRENCHY DESOTO; LOUIS HAO, MANU KAHAIALII; THOMAS KALUKUKUI, SR.; MOSES KEALE, SR.; and KEVIN MAHOE,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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76 pp

QUESTION PRESENTED

Whether officials of the state of Hawaii performing the duties of trustees under the trust established by § 5(f) of the Hawaii Admission Act have qualified immunity from an action alleging that they expended trust funds for uses and purposes other than those authorized by the terms of the trust?

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DOCTOR NUI LOA PRICE, AKA MAUI LOA, individually and in the capacity of Chief of The Hou Hawaiians; THE HOU HAWAIIANS, a native Hawaiian Ohana; and KAMUELA PRICE, individually and in the capacity of member of the Elder Council of The Hou Hawaiians,

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PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioners DOCTOR NUI LOA PRICE, THE HOU HAWAIIANS, and KAMUELA PRICE, respectfully pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS IN THE CASE

The amended opinion of the U.S. Court of Appeals for the Ninth Circuit sought to be reviewed is reported as *Price v. Akaka*, 9 F.3d 1220 (*"Akaka II"*), and is reprinted in the Appendix at pp. 1a-13a.

The District Court's unreported "Order Granting in Part and Denying in Part Motion for Judgment on the Pleadings, or in the Alternative for Summary Judgment,

and Denying Motion to Amend Complaint, and Motion to Strike Exhibits, Motion for Sanctions", filed on June 12, 1992, is reprinted in the Appendix at pp. 14a-38a.

The order of the Court of Appeals for the Ninth Circuit amending the opinion of the court sought to be reviewed is reprinted in the Appendix at pp. 39a-40a.

The amended opinion in an earlier appeal in this case is reported as *Price v. Akaka* 928 F.2d 824 (9th Cir. 1990)("*Akaka I*"). A petition by respondents herein for certiorari to review *Akaka I* was denied by this court *sub nom Akaka v. Price*, --- U.S. ---, 112 S.Ct. 436, 116 L.Ed.2d 455 (1991).

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit of which Petitioners seek review was filed and entered on August 23, 1993, and a timely petition for rehearing by Petitioners was filed on September 7, 1993. The amended opinion and amended judgment were entered by the Court of Appeals on November 2, 1993. The time in which this Petition may be filed thus extends to and includes January 31, 1994, and this Petition is timely. Jurisdiction in the District Court was conferred by 28 U.S.C. § 1343. Jurisdiction in this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Section 1983 of Title 42 of the United States Code provides that

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For

the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Sections 4 and 5(a), 5(b) and 5(f) of the Hawaii Admission Act, Pub. L. No. 86-3, 73 Stat. 4 (1959) provide that

> **§ 4.** As a compact with the United States relating to the management and disposition of the Hawaiian home lands, the Hawaiian Homes Commission Act, 1920, as amended, shall be adopted as a provision of the Constitution of said State, as provided in section 7, subsection (b) of this Act, subject to amendment or repeal only with the consent of the United States, and in no other manner: Provided, That (1) sections 202, 213, 219, 220, 222, 224, and 225 and other provisions relating to administration, and paragraph (2) of section 204, sections 206 and 212, and other provisions relating to the powers and duties of officers other than those charged with the administration of said Act, may be amended in the constitution, or in the manner required for State legislation, but the Hawaiian home-loan fund, the Hawaiian home-operating fund, and the Hawaiian home-development fund shall not be reduced or impaired by any such amendment, whether made in the constitution or in the manner required for State legislation, and the encumbrances authorized to be placed on Hawaiian home lands by officers other than those charged with the administration of said Act, shall not be increased, except with the consent of the United States; (2) that any amendment to increase the benefits to lessees of Hawaiian home lands may be made in the constitution, or in the manner required for State legislation, but the qualifications of lessees, shall not be changed except with the consent of the United States; and (3) that all

proceeds and income from the "available lands", as defined by said Act, shall be used only in carrying out the provisions of said Act.

§ 5. (a) Except as provided in subsection (c) of this section, the State of Hawaii and its political subdivisions, as the case may be, shall succeed to the title of the Territory of Hawaii and its subdivisions in those lands and other properties in which the Territory and its subdivisions now hold title.

(b) Except as provided in subsection (c) and (d) of this section, the United States grants to the State of Hawaii, effective upon its admission into the Union, the United States' title to all the public lands and other public property, and to all lands defined as "available lands" by section 203 of the Hawaiian Homes Commission Act, 1920, as amended, within the boundaries of the State of Hawaii, title to which is held by the United States immediately prior to its admission into the Union. The grant hereby made shall be in lieu of any and all grants provided for new States by provisions of law other than this Act, and such grants shall not extend to the State of Hawaii.

* * *

(f) The lands granted to the State of Hawaii by subsection (b) of this section and public lands retained by the United States under subsections (c) and (d) and later conveyed to the State under subsection (e), together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by said State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the

Hawaiian Homes Commission Act[1], 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States. The schools and other educational institutions supported, in whole or in part out of such public trust shall forever remain under the exclusive control of said State; and no part of the proceeds or income from the lands granted under this Act shall be used for the support of any sectarian or denominational school, college, or university.

Section 201(a)(7) of the Hawaiian Homes Commission Act, 1920 ("HHCA"), ch. 42, 42 Stat. 108 (July 21, 1921), provides that

> (7) the term "native Hawaiian" means any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778.[2]

Section 10-2 of the Hawaii Revised Statutes (1979) provides in pertinent part as follows:

> "Hawaiian" means any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian

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[1] The definition of the term "native Hawaiian" is set forth below.

[2] This definition shall apply herein whenever the term "native Hawaiian" is used.

Islands in 1778, and which peoples thereafter have continued to reside in Hawaii;[3]

STATEMENT OF THE CASE

A. Statutory Background. Prior to the arrival of Capt. Cook in the Hawaiian Islands in 1778, the aboriginal people had no concept of "ownership" of real property. Indeed, the idea of land as "property" was unknown. *Aina*, the land, was considered sacred. It was not a commodity capable of being "owned" by a mere, mortal human being. It was a community resource like the air and water.

Under Western influence, Hawaiians were introduced to the concept of land "ownership" with the idea that the king "owned" the land. At first, the king's title was in the nature of a trust. The Constitution of 1845 of the Kingdom of Hawaii, declared that all of the land was owned by the King, not outright as his own private property, but rather for the benefit of the people.

In 1848, private fee simple ownership of land was instituted in the great *mahele* by the government of Kamehameha III. Theoretically, the land was to be divided into thirds--one third for the King, one third for the chiefs, and one third for the people.

Unfortunately, this goal was not realized in practice. Instead, only 28,660 acres went to the people, while 1,571,000 acres were awarded to the chiefs and the remainder was retained by the King or government.

By 1920, native Hawaiians were "a landless people in the country of their forefathers." Sen. Doc. No. 151, 75th Cong., 3d Sess, Serial Set 10247 (Jan. 5, 1938), pp. 81-83.

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[3] This definition shall apply herein whenever the term "Hawaiian", as distinguished from "native Hawaiian", is used.

In order to redress this injustice and rehabilitate the native Hawaiian people, Congress enacted the HHCA. *Id*, at p. 83. By this act, more than 200,000 acres, designated "available lands", were set aside to be awarded to native Hawaiians[4] as 99-year leasehold homesteads at a rental of one dollar per year.

In 1947, H.R. 49, which ultimately became the Hawaii Admission Act, was introduced in the 80th Congress by Delegate Farrington. The original draft as proposed by the Hawaii delegation provided that, on admission to the Union, Hawaii would receive title to all of the public lands within the state, including the "available lands". The bill also provided that the state would adopt HHCA as a state law, subject to amendment in the same manner as the state constitution. H. Rep. No. 194, 80th Cong., Serial Set 11118 (Mar. 27, 1947).

The Secretary of the Interior objected to these provisions. To ensure enforcement of HHCA after statehood, the Secretary suggested that the federal government retain legal title to the "available lands" and proposed the "compact" language which ultimately became § 4 of the Admission Act and the trust language which is now found in § 5(f) of the Admission Act. Further the Secretary proposed that the state be allowed to select only one-ninth part of the public lands, approximately 200,000 acres, as land grants for schools and other public purposes. Similar grants, ranging between one and four sections per township, or between one-thirtysecond and one-ninth, had been given to all of the other states admitted into the Union prior to that time. *Id.*, p. 16.

The House Committee on Public Lands adopted a compromise. It approved the compact and trust lan-

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[4] See footnote 2.

guage now found in §§ 4 and 5(f) and provided that the new state would be allowed to select 180,000 acres at the time of admission. A study commission would then be established to propose the disposition of the remaining public lands. If Congress had not taken any further action on the subject within five years, title to the remaining public lands would pass to the state. *Id.*, pp. 4-5, 22-23.

Subsequent amendments eliminated the study commission provision. Thus, in 1959, on admission to the Union, Hawaii received title to approximately 1.4 million acres, including the "available lands". Admission Act, § 5(b). This is more than eight-tenths of the 1.7 million acres of public lands within the state. In consideration for which, Hawaii agreed to implement HHCA by accepting the compact provisions of § 4 and trust provisions of § 5(f).

By subsequent enactment of state law, OHA was established, to receive one-fifth of the income from the § 5(f) trust corpus, exclusive of the "available lands". Said funds are to be expended by the OHA board of trustees "for the betterment of the conditions of native Hawaiians." App. 15a, n.2.

B. Factual Background. From the inception of OHA, the state's goal has been to eliminate the 50% blood quantum requirement established by Congress in HHCA. App. p. 12a. This effort was frustrated by Attorney General Opinion No. 83-2 dated April 15, 1983, in which the Attorney General of the State of Hawaii answered the following question posed by OHA:

> By letter dated March 15, 1983, you requested our opinion on the following question:
>
> May the legislature, consistent with Section 5(f) of the Admission Act and Article XII of the State Constitution, authorized [sic] OHA to use funds derived from the Public Land Trust (Section 5(f) of the Admis-

sion Act) to better the conditions of Hawaiians as defined in Hawaii Revised Statutes, Section 10-2(5)?

We answer in the negative.

App. p. 25a.

OHA then set out to change the definition of "native Hawaiian" to eliminate the blood quantum requirement. Respondents (hereafter "Trustees") retained private counsel, Sherry Broder, who opined on July 12, 1988 that the Trustees could not only advocate such a change but could even use trust funds to do so, provided they determined that changing the definition would result in a benefit to the "native Hawaiian" trust beneficiaries. App. p. 28a.

Following this advice, the Trustees determined that adoption of a single definition would better the condition of native Hawaiians, in that the blood quantum requirement had long been recognized as the single most divisive issue in the Hawaiian community. App. p. 23a

Trustee Moses Keale, Sr., was not satisfied with Ms. Broder's opinion so he requested another, more specific, opinion from the State Attorney General as to the appropriateness of using § 5(f) funds to change the beneficiary definition. Specifically, Mr. Keale requested an opinion as to whether special funds derived from the public land trust and set aside to be held and used solely as a "public trust for the betterment of conditions of native Hawaiians", section 10-3(1), HRS, could properly be expended to advocate a change in existing law to create a single definition of the term "native Hawaiian" to include "Hawaiians" as the term is defined in section 10-2, HRS. App. p. 28a.

On July 28, 1988, the Attorney General's Office advised OHA that the use of special funds was restricted solely to "the betterment of the conditions of native Hawaiians", and use for the purpose of bettering the conditions of all Hawaiian people, rather than just native

Hawaiians would not be proper. The letter from the Attorney General provided in relevant part:

> Thus, we conclude that the use of funds derived from the ceded land funds to advocate a change in the law to provide for a single definition, is not a use *solely* for the betterment of conditions of native Hawaiians. Furthermore, such a use is inconsistent with the foremost goal to be pursued by OHA, the betterment of conditions of native Hawaiians.

App. pp. 28a-29a.

Undeterred by two strong warnings by the State Attorney General, the Trustees made appropriations of $23,200 for a media/public relations campaign to "educate" OHA beneficiaries[5] and to advocate ratification the single definition referendum, $10,000 as part of a «protocol» fund for the Ad Hoc Committee working on the proposed referendum, and $57,000 for a professional advertising campaign. App. p. 29, n.12.

C. Proceedings Below. On October 18, 1988, Petitioners[6] (hereafter "The Hou") filed a civil rights complaint in the U.S. District Court for the District of Hawaii, pursuant to 42 U.S.C. § 1983, alleging that Trustees violated § 5(f) of the Admission Act. The Hou seek to recover damages on behalf of the trust from the Trustees in the amount of funds expended by them to benefit

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[5] OHA beneficiaries are "Hawaiians *and* native Hawaiians".

[6] Plaintiff The Hou Hawaiians is a native Hawaiian Ohana or tribal body made up of related families of native Hawaiians. Plaintiff Doctor Nui Loa Price is the hereditary chief of the Hou Hawaiians and a native Hawaiian. Plaintiff Kamuela Price is not a native Hawaiian. He is the father of Maui Loa and is a member of the elder council of the Hou Hawaiians.

Hawaiians who are not native Hawaiians, in particular, by advocating a change in the class of beneficiaries to eliminate the blood quantum requirement. App. pp. 16a, 23a, and 31a, n.16.

Before answering, Trustees filed a motion to dismiss on grounds of failure to state a claim. App. p. 35a, n.17. On January 11, 1989, the district court granted Trustees' motion to dismiss the complaint holding that the complaint failed to state a claim because the Admission Act did not impose the obligations which The Hou assert were violated, and because the suit was against Trustees in their official capacities and therefore barred by the Eleventh Amendment. Judgment was entered in favor of Trustees on January 17, 1989, and The Hou appealed. App. p. 16a.

On March 21, 1991, the Ninth Circuit reversed that judgment of the district court. The Ninth Circuit held that The Hou stated a claim under 42 U.S.C. § 1983 for violations of § 5(f) by alleging in their complaint that Trustees have expended the trust income on purposes other than those listed in § 5(f). *Price v. Akaka*, 928 F.2d 824, 826, (9th Cir.), *cert. denied* 112 S.Ct. 436 (1991).

Trustees' petition for rehearing, raising the issue of qualified immunity for the first time, was denied by the Ninth Circuit Court. In a petition to this Court for a writ of certiorari to review that decision of the Ninth Circuit, Trustees again raised the qualified immunity defense. *Akaka v. Price*, S.C. No. 90-1941. The Hou opposed that petition on the grounds that the issue had not been adequately raised below and had been waived by failure to raise it in the motion to dismiss. S.C. No. 90-1941, Br. in Opp., p. 2.

On November 18, 1991, this Court denied Trustees' petition for certiorari. 116 L.Ed.2d 455. On the very same day, Trustees filed an omnibus motion to dismiss the complaint or, alternatively, for summary judgment. App. p. 36a. The grounds for this motion were as

follows: (1) that either judgment on the pleadings or summary judgment was appropriate because The Hou's claims fail on the merits, (2) Trustees were entitled to qualified immunity, (3) Trustees were entitled to absolute immunity, and (4) § 5(f) is unenforceable via 42 U.S.C. § 1983 in view of *Suter v. Artist M.*, 112 S.Ct. 1360 (1992). App. 17a.

With respect to the issue of qualified immunity, the Hou opposed the motion on three grounds. They argued that the use of § 5(f) trust funds to advocate a change in the definition of trust beneficiaries was a *per se* violation of § 5(f). A matter about which the Trustees had no discretion and, therefore, no immunity. The district court rejected this argument. App. p. 24, n.8.

The Hou argued that qualified immunity was not available to the Trustees, because the law was sufficiently clear in 1988 that use of § 5(f) trust funds in their control was limited *solely* to the betterment of the conditions of native Hawaiians and not Hawaiians. The district court agreed and denied the Trustees motion with respect to the use of funds for the single definition referendum.

The district court found that the Attorney General opinion issued in 1983 unequivocally advised the Trustees that the Hawaii legislature could not authorize the use of § 5(f) funds to better the conditions of Hawaiians. App. p. 30a.

The district court further found that the contours of the law in 1988 were "sufficiently clear that a reasonable official would understand that what he was doing violates that right." Therefore, if § 5(f) funds were used to advance the single definition referendum, Trustees would not be entitled to qualified immunity for their actions. App. p. 30a.

The Trustees filed an immediate appeal from to the Ninth Circuit Court from this adverse ruling on qualified immunity. The Court of Appeals did not discuss The

Hou's argument that use of § 5(f) trust funds to change the definition of beneficiaries was a matter in which they had no discretion and, therefore, no qualified immunity.

The Court of Appeals reversed, holding that the Trustees were entitled to qualified immunity on the single definition referendum issue, because they found that changing the definition would benefit the present native Hawaiian beneficiaries by removing the blood quantum source of divisiveness in the Hawaiian community.

The Hou also argued below, as in their opposition to the Trustees petition for certiorari in S.C. No. 90-1941, that the Trustees waived the defense of qualified immunity when they failed to raise it in their first motion to dismiss the complaint. Neither the district court nor the court of appeals addressed this argument in their opinions.

REASONS WHY THE WRIT SHOULD ISSUE

The Report to the Governor and the Legislature of the State of Hawaii, "Management and Financial Audits of the Office of Hawaiian Affairs, by The Auditor of the State of Hawaii, Rep. No. 93-28, December, 1993 explains:

> In Act 35, SLH 1993, the Legislature appropriated $136.5 million to OHA for back payments and interest on OHA's share of previously collected public land trust revenues. OHA received these funds by June 30, 1993. These revenues transform OHA from a relatively minor state agency to a major force that can have a significant impact on Hawai'i.

Id. at p. 5.

> Changes in OHA and its funding make it appropriate for the Board of Trustees and OHA to reconsider their basic responsibilities and duties and to determine how they can better meet the new challenges. In this context, it is particularly important for the board to have an understanding of its fiduciary

responsibilities and for OHA to strengthen its management.

OHA is governed by a Board of Trustees (board) that is the policy and decision making body of OHA. The board consists of nine trustees elected by Hawai'i residents of Hawaiian ancestry who have registered to vote for the OHA board. * * *

Chapter 10, HRS, affirms the State's trust obligations to the native Hawaiians and the State's delegation of this obligation to OHA. OHA and the trustees are therefore fiduciaries to the native Hawaiians and Hawaiians. OHA's policies and procedures manual further acknowledges this trust relationship by stating that the board shall act according to the highest fiduciary standards of a private trustee.

As fiduciaries, trustees have certain fundamental duties. The duties of trustees with respect to their actions on behalf of beneficiaries are based on trust law. [The auditor here cites George T. Bogert, *Trusts, Sixth Edition*, Hornbook Series Student Edition, West Publishing Co., St. Paul, MN, 1987, 793 pgs.] Three fundamental duties are marshaling resources, loyalty, and prudence.

Id. at p. 6.

A second fundamental duty of a fiduciary is that of loyalty. Loyalty implies that trustees must administer the trust solely in the interest of the beneficiaries. Trustees must refrain from any activities that would result in a gain by a trustee or a third party at the expense of the trust.

The duty of loyalty also subjects trustees to higher and stricter standards of conduct than those associated with ordinary business relationships. When there are co-trustees, such as at OHA, individual trustees are also responsible for preventing other trustees from committing a breach of trust and for redressing any breach of trust that has been committed.

Id. at p. 8.

> With respect to the duty of loyalty, some trustees cited their responsibilities to the constituents who elected them rather than to the beneficiaries of the trust as a whole. Other trustees equated their role with that of legislators. This is correct to the extent that legislators have an implied fiduciary responsibility. It is insufficient, however, in that OHA is an express trust where trustees have specific duties and obligations to the beneficiaries.
>
> Seeing themselves as equivalent to legislators would permit board members to engage in activities that would not be appropriate for trustees who are held to the higher fiduciary standard dictated by the duty of loyalty. For example, it would appear inappropriate for an elected trustee to advocate terminating OHA while in a fiduciary role. The trustees' understanding of loyalty is also called into question by other actions. Some OHA staff offices have complained that some trustees have used OHA facilities for personal purposes.

Id. at p. 9.

> The board, as a fiduciary, is responsible for assuring that OHA operates in a prudent, diligent, and effective manner on behalf of all the beneficiaries of the trust.

Id. at p. 11.

> OHA has two trusts from two major sources of funding--one for native Hawaiians and one for Hawaiians. The trust for native Hawaiians is funded by the 20 percent pro rata portion of the revenues from the public land trust received by OHA. The Admission Act restricts the use of these funds to programs that benefit native Hawaiians. The trust for Hawaiians is supported by the State's general fund.
>
> * * *
>
> Recent legal decisions have expanded the interpretation of "betterment of the condition of native

> Hawaiians.' This expanded interpretation gives OHA more flexibility in the use of native Hawaiian trust funds, but OHA still needs general fund appropriations from the Legislature to fund programs for Hawaiians. The Legislature and OHA have generally followed a practice of matching general funds and trust revenues for OHA's operating budget.
>
> The basis for dual funding is the continued classification of Hawaiians into two groups by blood quantum. The Constitutional Convention hoped to remove this distinction -- OHA has conducted two referenda on the blood quantum distinction; both referenda supported the removal of the distinction. Resolution of this issue remains one of OHA's objectives.

Id. at p. 18.

The duty of loyalty which prevents the trustee from acting to benefit third parties at the expense of the trust is so well established that the State Auditor was able to understand and properly explain it. Undivided loyalty to the beneficiary is clear. The Trustees were advised of this duty of loyalty by Attorney General opinions in October, 1983 and July, 1988. They were told that § 5(f) trust funds can be used *solely* to benefit native Hawaiians.

There are only about 25,000 native Hawaiian beneficiaries of the § 5(f) trust. On the other hand there are more than 250,000 Hawaiians. It is not surprising that trustees elected by Hawaiians would want to change the definition of the class of beneficiaries to benefit all of their constituency. It is not surprising that their constituents voted to approve the change.

However, neither the Hawaii Legislature nor the Court of Appeals has the power or authority to sanction a change of ten-fold increase in the beneficiary class defined by Congress. *See* Annotation, "Extension of Charitable Trust Benefits", 68 A.L.R.3d 1049 (1976). Even if elimination of the blood quantum may have been of some benefit to native Hawaiian beneficiaries by

eliminating divisiveness in the Hawaiian community, that benefit is secondary. Non-native Hawaiians will receive the primary benefit of changing the class definition. By advocating the change in class definition, the Trustees violated their duty of undivided loyalty, even if they had not used trust funds for the purpose.

The Auditor's Report discloses that the present OHA trustees are persisting with their efforts to enlarge the class of beneficiaries. They apparently believe the decision of the Court of Appeals in this case gives them more "flexibility" in the use of trust funds.

Because of number of beneficiarise involved, their status as native wards of the government, the amount of money, and the "significant impact" that OHA has on the State of Hawaii, The Hou submit that this Court should grant the writ of certiorari to correct a serious error on the part of the Court of Appeals.

But there is much more to this case than simply an illegal attempt by the Trustees to enlarge the beneficiary class. The underlying issue in this case is whether the state of Hawaii should be allowed to continue to violate federal law intended to provide farms and homes for native Hawaiians, while using the homeless plight of native Hawaiians as the basis for claims against the United States for land, resources and money damages totalling tens of billions of dollars. OHA's effort to change the definition of the beneficiary class was just the first step in a plan by the state to do exactly that.

Congress enacted the Hawaiian Homes Commission Act more than 70 years ago to return native Hawaiians to the land that had been wrongfully taken away from them. In 1959, at statehood, Congress accepted the solemn compact from the state that it would implement the program. Congress gave the state 1.4 million acres of land with which to accomplish this goal.

Since statehood, the state has all but abandoned the HHCA homestead program. One might say it has been

"grossly neglected." Numerous government reports and studies have come to this conclusion.[7] Few programs have been the subject of so many investigations and reports. If as much time, money and energy had been put into implementation of the program as studying it, many more native Hawaiians would be living on their homesteads.

The shameful treatment of native Hawaiians by their own state government was brought to the attention of the entire nation on September 9, 1991 in "Broken Promise: How Everyone Got Hawaiians' Homelands Except Hawaiians", a full-page article on pages 1 and 3 of the *Wall Street Journal* by Susan C. Faludi.

Many of the Hou Hawaiians have personal experiences exactly like those described by Ms. Faludi in this article. Several members of The Hou Hawaiians are or have been homeless. Some live in tents on the beaches, others live in old abandoned busses. Many members

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[7] *Breach of Trust? Native Hawaiian Homelands*, Hawaii Advisory Committee to the U.S. Commission on Civil Rights, October, 1980; *Review of Hawaiian Homes Commission Programs*, U.S. Dept. of the Interior, Office of Inspector Genera, Audit Report, September, 1982; *Report on the CULTURE§ NEEDS AND Concerns of Native Hawaiians*, Native Hawaiian Study Commission, June, 1983; *Report to the United States Secretary of the Interior and the Governor of the State of Hawaii*, Federal-State Task Force on the Hawaiian Homes Commission Act, August, 1983; *Final Report on the Public Land Trust*, Legislative Auditor of the State of Hawaii, Rep. No. 86-17, December, 1986; *A Broken Trust, The Hawaiian Homelands Program: Seventy Years of Failure of the Federal and State Governments to Protect the Civil Rights of Native Hawaiians*, Hawaii Advisory Committee to the U.S. Commission on Civil Rights, December, 1991; *Progress Report on the Implementation of Recommendations of the Federal-State Task Force*, Office of the Governor of the State of Hawaii, January, 1992; *Hawaiian Homes Commission*, U.S. Dept. of the Interior, Office of Inspector General, Audit Report, Rep. No. 92-I-641, March, 1992; *Management and Financial Audit of the Department of Hawaiian Home Lands*, Auditor of the State of Hawaii, Rep. No. 93-22, December, 1993

have been on the waiting list for a homestead award for more than ten years. One homeless member has been waiting for thirty years.

All of these reports and articles have not resulted in any improvement of the condition of native Hawaiians because the state blames the federal government for the problem. The state claims that the federal government has failed to provide funding for the program. The state consistently refuses to consider using income from the § 5(f) corpus as a means of funding the program.

If the state had been acting in good faith, it could have long ago completely implemented the Hawaiian Homes program. The number of beneficiaries is relatively small and the resources are vast.

The Department of Hawaiian Home Lands has approximately 14,000 pending applications for homesteads. DHHL has estimated that it will cost approximately $2.4 billion to provide 14,000 homesteads over the next ten years. This estimate is exaggerated, because the state wants to get the money from the federal government.

In fact, much of this expense would be used to provide paved streets with curbs, gutters, sidewalks, street lights, fire protection and sewers, all required by state and local subdivision laws and ordinances. This kind of infrastructure is not necessary for agricultural purposes. All that is necessary is an all-weather road and water. Most of the expense of infrastructure is created by state and local laws that could be waived in the case of Hawaiian homesteads. Able bodied native Hawaiians could provide much of the infrastructure themselves, if only allowed to occupy the land.

At the present time, OHA has $150,000,000 in § 5(f) trust funds, which represents only a small portion of the

trust income over the past ten years.[8] This sum represents much *less* than the 20 percent of § 5(f) trust that OHA was supposed to have received over the past 10 years. Thus the total income in ten years was more than $750 million. This amount is much less than it should have been because the inadequate revenues the state received from lessees, licensees, permittees and trespassers on § 5(f) trust lands. Many cases can be found where lessees are paying as little as ten percent of the appraised fair market rental.

Thus, the total revenues from trust lands in the 35 years since state hood have probably actually been at least $ 2.4 billion and should have been several times that much.

Of course OHA would not consider using any of its funds to provide infrastructure for Hawaiian homesteads. Rather than spend trust funds to better the condition of native Hawaiian, the Trustees have been accumulating and reinvesting income as a means of enhancing their own personal political power. Now that the accumulated trust funds in OHA's control exceeds $150,000,000 they have proclaimed themselves "players" in the Hawaii political arena.

Instead of using the trust funds to better the conditions of the native Hawaiian beneficiaries, OHA has embarked on this campaign to change the definition of "native Hawaiian" to eliminate the 50% blood quantum restriction and then seek billions of dollars in land, resources and damages from the federal government in the name of native Hawaiians. At the same time the scheme will relieve the state of any further obligation to

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[8] In the settlement of OHA's 10-year legal battle with the state over its share of the § 5(f) trust revenue, OHA did not get a full 20 per cent share of all of the § 5(f) trust fund income. It gave up its claim to a share of the $1 billion lease rent from Duty Free Shopper's concession at the Honolulu International Airport.

native Hawaiians, and clear title to 80 percent of the § 5(f) trust lands.

The plan was described in the Honolulu *Star-Bulletin & Advertiser*, July 23, 1989, p. A-8, as follows:

> OHA's Blueprint for Native Hawaiian[9] Self-Determination and Land Claims outlines the basis of Hawaiian claims for redress for the illegal overthrow of the Kingdom of Hawaii in 1893 -- and then says what Congress should do to resolve them.
>
> It also describes a process for setting up a sovereign entity that would transform the state-constituted OHA into a native-created government with its own governing document.
>
> * * *
>
> [Trustee Rodney] Burgess calls the blueprint "a concerted game plan to collectively garner all resources into a single structure or organization truly representative of all our people."
>
> * * *
>
> [The blueprint] concludes that to achieve the goals, OHA must propose legislation in Congress that acknowledges the right of native Hawaiians to self-determination and a sovereign status and provides for the return of lands and resources to native Hawaiians.

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[9] In OHA's Blueprint the term "native Hawaiian" is not limited to persons of 50% or more Hawaiian ancestry. As used here the term Native Hawaiian includes persons of any amount of Hawaiian ancestry.

The major author of this document was Prof. Jon Van Dyke[10], professor of law at the William S. Richardson School of Law, University of Hawaii.

As noted by State Auditor this proposal that OHA be terminated and replaced by a sovereign OHA entity is, in itself, a breach of trust.

Substantial opposition to this plan arose, because OHA proposed to replace the several groups already existing, such as The Hou Hawaiians, Ka Lahui Hawai'i and others. In spite of the Hawaiian community opposition to the Blueprint, on February 7, 1992, OHA adopted proposed legislation to implement the plan. The legislation consisted of three bills -- the "Native Hawaiian[11] Recognition and Restoration Act" ("Sovereignty Bill"), purporting to establish a sovereign government to represent The Hou Hawaiians and all other Hawaiians and native Hawaiians; the "Native Hawaiian[12] Claims Settlement Act", ("Claims Settlement Bill"), which purports to settle all land claims by The Hou and all other Hawaiians and native Hawaiians against the state of Hawaii and United States; and the "Federal Right-to-Sue Act", which purports to create a statutory right for Hawaiians to sue to enforce their rights under § 5(f) and HHCA.

The Claims Settlement Bill provides that the United States will transfer to the government established by the Sovereignty Bill all lands and submerged lands which

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[10] Prof. Van Dyke is the husband of attorney Sherry Broder, both of whom are on contract to represent OHA. The Hou are aware that Prof. Van Dyke occasionally entertains members of this Court on their visits to Hawaii. In light of the frequency with which the issue of native Hawaiian rights has come before this Court in recent years, The Hou assume that he has not discussed this issue during these meetings. However, they cannot help but have their doubts.

[11] See footnote 9.

[12] See footnote 9.

formerly belonged to the Kingdom of Hawaii, § 4(a)(1); the Hawaii National Parks, § 4(a)(4); and $10 billion as compensation for the use of these lands since annexation of Hawaii in 1898, § 4(b)(1).

Under the Claims Settlement Bill, the state would convey all of the "available lands", 20 percent of the remaining § 5(f) lands and 20 percent of the income from the remaining § 5(f) lands, to the United States, in trust, for the use of the government created by the Sovereignty Bill, § 5(a)(1). In exchange for this, the state will receive title to the remaining § 5(f) lands free and clear from any further claim by Hawaiians or native Hawaiians.[13]

In the 1993 session of the Hawaii State Legislature, OHA introduced a bill similar to the Sovereignty Bill, as House Bill 1992 [First draft]. During three days of testimony, hundreds of Hawaiians demonstrated and scores of Hawaiians testified against the bill. The Hou Hawaiians opposed the bill on the grounds that the State does not have constitutional authority to establish a sovereign native government to represent them. The Hou, themselves, claim to be a sovereign Native American tribal *ohana* and do not choose to be represented by any government created by the State of Hawaii. Other Hawaiian organizations also claim to be Native American sovereign entities. Ka Lahui Hawaii, the largest of these with about 20,000 members, vigorously opposed the state-created "sovereign" Hawaiian government.

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[13] Sec. 7(b) of the Claims Settlement Act provides:

> Receipt by the United States on behalf of the [government created by the Sovereignty Bill] of the benefits provided by Section 5 of this Act shall constitute a complete and total waiver of all claims of Native Hawaiians against the State of Hawaii for land or damages arising out of the overthrow of Queen Liliuokalani in 1893 and the annexation of Hawaii by the United States in 1898 and the subsequent receipt of the Crown and Government lands of the Kingdom of Hawaii by the State of Hawaii.

In light of the overwhelming opposition to it, OHA's bill was gutted and completely rewritten to create a Hawaiian Sovereignty Advisory Commission, all of the members of which were appointed by the Governor, and are state Indians. The task of this commission was to report to the legislature on the question of holding a plebiscite among OHA's constituency on the question of whether or not the state should proceed to create a sovereign government to represent them.

In his State of the State address to the Hawaii Legislature, on January 27, 1994, Gov. Waihee commented on the sovereignty question as follows:

> "In 1993, sovereignty was front and center in a year of recognition and reflection. 1994 brings the necessity of action. Clearly, there are few today who doubt that sovereignty will happen. It is a matter of how, when and in what form.
>
> As you know, the state cannot confer sovereignty. That is the kuleana (concern) of the federal government, with many steps yet to be taken.
>
> Now is the time to press even harder on the federal front. At long last, talks have begun with the Department of Interior on land claims, political status, trust responsibility.

Honolulu *Advertiser*, January 28, 1994, p. A-15.

In light of the magnitude of OHA's claims against the United States, it is apparent why it is necessary to change the definition of native Hawaiian. There are simply not enough native Hawaiians to justify these claims. Further, by changing the definition of native Hawaiian, the few thousand members of the existing Hawaiian organizations who claim sovereignty can easily be outvoted.

It might seem improbable that such enormous claims would be given serious consideration by Congress, even if made on behalf of 250,000 purported claimants. But Hawaii's Congressional delegation has been working on this plan as well. Sen. Daniel Inouye recently succeeded

in adding an appropriation into the defense budget for $500 million to "clean up" Kaho'olawe.

Kaho'olawe is an uninhabited island south of Maui, which has been used by the Navy for target practice since the 1950's. The appropriation is to clear the island of unexploded ordinance so that the island can be "returned" to OHA's Hawaiian sovereign nation and used as a gambling resort. The Hou question whether this enormous expenditure was necessary or worthwhile. It is certain that none of this money will be spent in a way that will benefit native Hawaiians. That amount of money would have been more than adequate to complete the Hawaiian Homestead program.

Meanwhile, Sen. Daniel Akaka has obtained Congressional approval of a resolution "apologizing" for the wrongful role played by the United States in the overthrow of the government of Queen Liliuokalani. In so doing, Congress has unknowingly already approved many of the findings that form the basis for OHA's Sovereignty Bill.

This apology is now being used as the basis for the argument that the state of Hawaii was wrongfully and illegally created. On January 9, 1994, the Honolulu *Advertiser* reported that Dennis Kanahele resigned in protest from the Hawaiian Sovereignty Advisory Commission. The paper reported that

> He explained that his resignation was prompted by a speech delivered in Honolulu last month by Francis Anthony Boyle, a professor of international law at the University of Illinois.
>
> Boyle noted that Congress approved a resolution last fall apologizing to native[14] Hawaiians for U.S. involvement in the overthrow of the Hawaiian monarchy in 1893. In approving that measure, Boyle said, the United States conceded that native Hawaiians

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[14] See footnote 9.

have a right to restore their status as an independent nation.

"Congress is effectively conceding now that the (statehood) vote is meaningless, as a matter of international law and United States domestic law. So you're not bound by it. Rather I'm suggesting you're now free to determine your own fate pursuant to the principle of self-determination." Boyle said.

Meanwhile, an article titled "Molokai fire called resort protest" appeared on page 1 of the January 28, 1994 *Advertiser*, as follows:

"Frustration" over losing water in favor of a resort development led to a fire at two construction trailers at a Central Molokai water pipeline project, Hawaiian leader Sam Kealoha says.

Police say yesterday's fire -- which is not expected to delay the project -- was deliberately set. Kealoha, an Office of Hawaiian Affairs trustee, said the fire was undoubtedly an attempt to protest the project.

Residents fear the project to pump water to the Kaluakoi Resort in West Molokai will leave no water for Hawaiian homestead lands in Central Molokai. And they say neither the state nor the county is responding to their concern.

"Frustration, that's what it is," Kealoha Said.

Honolulu *Advertiser*, January 28, 1994, p. 1.

On January 30, 1994, the following letter from Lilikala Kame"eleihiwa, Director of the Center for Hawaiian Studies at the University of Hawaii appeared in the *Advertiser*:

It is outrageous and maha'oi (rude) in the extreme that the haole editors of The Honolulu Advertiser think they have the right to object to native Hawaiians living on Hawaiian trust lands (Editorial, "Beach squatters: These parks are for all to enjoy," Jan. 19). Of course, the only reason haole editors have any right to do so is because of the American military presence in Hawaii.

American military presence shores up bastions of haole power like The Honolulu Advertiser, whose staff is overwhelmingly haole at the editorial and reporter level and whose reporting shapes public opinion. The Advertiser has not a single Hawaiian reporter or editor on staff. With no Hawaiian voice, they easily twist the truth with anti-Hawaiian bias.

They asked, "Should anyone with Hawaiian blood be free to occupy whatever vacant lands they fancy?" Correction: The lands being presently occupied are Hawaiian trust lands as defined by American law. American law also defines Hawaiians as wards of the state, barring us from suing in court for access to our trust lands.

The editors argue that beach parks are for all to enjoy "now and forever, and that Hawaiians living on the beaches "deny their use to everyone else." Wake up, Advertiser. It's not Hawaiians who obstruct access to the miles of beaches in Hawaii, it is rich foreigners and hotels who do so.

And don't be too sure about control "forever." British colonials discovered that natives can't be oppressed indefinitely!

Honolulu *Advertiser*, January 30, 1994, p. B-3.

While the Hou Hawaiians claim to be a sovereign native Hawaiian *ohana* or tribal body, they have no desire to declare independence from the United States or secede from the Union. The Hou trust the Constitution and laws of the United States will protect their rights as a minority much more effectively than a sovereign nation created by OHA and the state of Hawaii. The Hou believe that the courts, rather than streets, are the proper forum to assert their rights and redress their griviences with their government.

The Ninth Circuit has repeatedly held that they have the right to sue. As Director of the Center for Hawaiian Studies and the University of Hawaii, the writer of this letter should have known that. The Hou have been

litigating for 14 years with little apparent success. So far the Court has not actually allowed them to address the merits of any of their claims. *Price v. State of Hawaii*, 764 F.2d 625, 626 (9th Cir. 1985), *cert. denied* , 474 U.S. 1055, 106 S.Ct. 793, 88 L.Ed.2d 771 (1986) ("*Price I*"); *Akaka I, supra*; *Price v. State of Hawaii*, 921 F.2d 950, (9th Cir. 1990) ("*Price II*"); *Price v. State of Hawaii*, 939 F.2d 702, (9th Cir. 1991), *cert. denied sub nom Paty v. Price*, 117 L.Ed.2d 622 (1991) ("*Price III*"); *Akaka II, supra*.

This only adds to the frustration of the native Hawaiians and statements like those contained in this letter.

Nevertheless, The Hou have been persistent in attempting to establish the parameters of the native Hawaiian's right to sue under § 5(f). In these cases, the state has repeatedly raised the issues of standing and whether the Admission Act creates an enforceable right under § 1983. The state's continual relitigation of these issues discourages native Hawaiians from seeking judicial redress.

If certiorari is granted herein, these threshold issues will necessarily be decided also. One decision from this court will definitively resolve many issues that may never be finally settled in the Ninth Circuit. A substantial body of law in the Ninth Circuit will enable this Court to properly consider these questions. In addition to the "Price" cases cited above, the Ninth Circuit has also decided the following cases which involve § 5(f) claims: *Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Comm'n*, 588 F.2d 1216, (9th Cir. 1978), *cert. denied*, 444 U.S. 826, 100 S.Ct. 49, 62 L.Ed.2d 33 (1979); *Keaukaha-Panaewa Community Ass'n v. Hawaiian Homess Comm'n.*, 739 F.2d 1467, (9th Cir. 1984); *Ulaleo v. Paty*, 902 F.2d 1395, (9th Cir. 1990); and *Napeahi v. Paty*, 921 F.2d 897, (9th Cir. 1991), *cert. denied*, 116 L.Ed.2d 230 (1991).

Further, this court has decided several cases involving claims against state officials by or on behalf of land

grant beneficiaries under statehood admissions acts. *ASARCO Inc. v. Kadish*, 490 U.S. 605, 109 S.Ct. 2037, 104 L.Ed.2d 696 (1989); *Papasan v. Allain*, 478 U.S. 265, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986); *Lassen v. Arizona*, 385 U.S. 458, 87 S.Ct. 584, 17 L.Ed.2d 515 (1967).

CONCLUSION

For the foregoing important reasons, the Hou respectfully request this Court to issue its Writ of Certiorari to the Ninth Circuit Court of Appeals to review the opinion in *Price v. Akaka*, C.A. No. 92-16462, filed August 23, 1993, amended November 2, 1993, and published as *Price v. Akaka*, 9 F.3d 1220 (9th Cir. 1993).

Dated: Honolulu, Hawaii, January 31, 1994.

Respectfully submitted,

Walter R. Schoettle
(Counsel of record)

Kamuela Price, pro se

APPENDIX "A"

No. 92-16462

D.C. No. 88-0773-DAE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NUI LOA PRICE, DR., AKA MAUI LOA, individually and in his capacity as chief of the Hou Hawaiians; THE HOU HAWAIIANS, a native Hawaiian Ohana; KAMUELA PRICE, individually and in his capacity as member of elder council of the Hou Hawaiians, *Plaintiffs-Appellees*,

v.

MOANIKEALA AKAKA; ROD BURGESS; CLARENCE CHING; FRENCHY DESOTO; LOUISE HAO; MANU KAHAIALII; THOMAS KALUKUKUI, SR.; MOSES KEALE, SR.; and KEVIN MAHOE, *Defendants-Appellants*.

Appeal from the United States District Court for the District of Hawaii, David A. Ezra, District Judge, Presiding

Argued and Submitted May 5, 1993--Honolulu, Hawaii

Filed August 23, 1993

Amended November 2, 1993

Before: Alfred T. Goodwin, Thomas Tang and John T. Noonan, Jr., Circuit Judges

Opinion By Judge Tang

OPINION

TANG, Circuit Judge:

Dr. Nui Loa Price, Kamuela Price, and the Hou Hawaiians, a native Hawaiian tribal body, (collectively "Price") sued the board of trustees ("trustees") for the Office of Hawaiian Affairs ("OHA") in their individual capacities under 42 U.S.C. § 1983 for commingling, managing, administering, and expending trust funds in violation of the Hawaii Admission Act of 1959, Pub. L. No. 86-3, 73 Stat. 4 ("Admission Act"). The trustees moved for judgment on the grounds of qualified or

absolute immunity. The motion was granted in part and denied in part. The trustees brought this interlocutory appeal challenging the partial denial of immunity. The trustees argue that they are entitled to immunity for using trust funds for a referendum on whether the definition of "native Hawaiian" should be amended to include all people of Hawaiian ancestry and not just those with 50% or more Hawaiian blood (the "Single definition Referendum"). The trustees additionally contest the district court's determination that Price has standing to bring a § 1983 claim based on the Admission Act. We affirm in part and reverse in part.

Historical Background

In 1959, Congress admitted Hawaii into the Union and "declared [Hawaii] to be a State of the United States of America." Admission Act. In return, Hawaii made a compact with the United States to adopt the "Hawaiian Homes Commission Act, 1920." Pub. L. No. 34, ch. 42, 42 Stat. 108 (1921 ("HHCA"), as part of its state constitution. *Id.* § 4. Under the HHCA, some 200,000 acres of land designated as "available lands" were to be leased to native Hawaiians at a nominal rate for 99 years. The HHCA defines "native Hawaiian" as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." HHCA § 201.[1]

Section 5(b) of the Admission Act granted Hawaii "title to all the public lands and other public property within the boundaries of the State of Hawaii," including the "available lands" set out in the HHCA, (hereinafter "§ 5(b) lands"). *See Price v. Akaka*, 928 F.2d 824, 826 n.1, (9th Cir. 1990) ("*Akaka I*"), *cert. denied*, 112 S.Ct. 436, (1991). Hawaii holds these § 5(b) lands as a public trust for five purposes: (1) for the support of public

[1] Unless otherwise stated, the term «native Hawaiian» shall be used as defined by the Hawaii Homes Commission Act.

schools and other public educational institutions; (2) for the betterment of the conditions of native Hawaiians; (3) for the development of farm and home ownership; (4) for the making of public improvements; and (5) for the provision of lands for public use. Admission Act § 5(f).[2]

In accordance with the Admission Act, Hawaii amended its constitution and declared that "[t]he lands granted to the State of Hawaii by Section 5(b) of the Admission Act . . . excluding therefrom lands defined as 'available lands' by . . . the [HHCA] . . . shall be held by the State as a public trust for native Hawaiians and the general public." Haw. Const. art. XII, § 4. The OHA was charged with the responsibility of administering and managing the trust proceeds. Hawaii then enacted Chapter 10 of the Hawaii Revised Statutes ("H.R.S.") to fund the OHA. Under H.R.S. §§ 10-13.5 and 10-3, the OHA is funded in part with twenty percent of all income derived from the § 5(f) public trust. As to this transfer, we held that:

> Transferring a portion of the § 5(f) trust income to a state agency . . . [does] not dissolve or dilute the restrictions on how that income may be spent. So long as § 5(f) trust income remained in the hands of the state, as it did when transferred from the § 5(f) corpus to the OHA corpus, the § 5(f) obligations applied. Naturally, we accept that once the income has been "disposed of" or "used" by the state, there are no § 5(f) limitations on subsequent use; however, we reject the trustees' suggestion that Hawaii "disposed of" or "used" § 5(f) trust income simply by transferring it to the OHA. Admission Act § 5(f).

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[2] Although the § 5(b) lands include the «available lands» under the HHCA, § 4 of the Admission Act «strictly limits the manner in which Hawaii may manage the homelands and the income they produce.» *Price v. Akaka*, 828 F.2d 824, 826 n.1, (9th Cir. 1990) («*Akaka I*»), *cert. denied* 112 S.Ct. 436 (1991).

> Because the funds are still in state hands, § 5(f)'s restrictions apply to the use or disposal of the income *by* OHA.

Akaka I, 928 F.2d at 827.

Thus, the issue here is whether the trustees breached their fiduciary duties under the Admission Act by expending trust funds for purposes other than those set out in § 5(f).[3]

Factual Background

The OHA trustees proposed a "Single Definition Referendum" to native Hawaiians and Hawaiians, concerning whether the definition of native Hawaiians should be amended to include all people of Hawaiian ancestry and not just those with 50% or more Hawaiian blood. The trustees believed that "adoption of a single definition would better the condition of native Hawaiians, in that the blood quantum requirement had long been recognized as the single most divisive issue in the Hawaiian community." The trustees used § 5(f) funds for mailing out and distributing the nonbinding Referendum ballots.

In response, Price filed a complaint under 42 U.S.C. § 1983 against he trustees in their individual capacities challenging this expenditure of § 5(f) funds. The complaint alleged that the trustees: (1) wrongfully commingled § 5(f) funds with other OHA funds; (2) failed to manage and administer the trust in accordance with Congress' purposes and in particular for the benefit of native Hawaiians; (3) expended § 5(f) funds for purposes contrary to § 5(f) of the Admission Act; and (4) expended

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[3] Whether the Trustees breached their fiduciary duties under Chapter 10 of the H.R.S. is a matter of state law which we do not reach. *See Price v. State of Hawaii*, 921 F.2d 950, 956, (9th Cir. 1990) («*Price II*») («it is not [the federal court's] function to attempt to seek out conflicts between the enactments of the State and section 5(f) of the Act»).

§ 5(f) funds for the benefit of non-native Hawaiians who are not beneficiaries under § 5(f) of the Admission Act.

The trustees moved to dismiss the action. The district court granted the motion holding that "the complaint failed to state a claim because the Admission Act did not impose the obligations which plaintiffs assert were violated, and because the suit was against defendants in their official capacities and therefore barred by the Eleventh Amendment."

On appeal, we held that because Price alleged that the trustees expended § 5(f) funds in contravention of the Admission Act he stated a federal claim enforceable under 42 U.S.C § 1983. *Akaka I*, 928 F.2d at 827-28. We further held that because Price is suing the trustees in their individual capacities the Eleventh Amendment does not apply, *id*, at 828, and reversed and remanded the case to the district court, *id*, at 829.

On remand, the district court ruled that the trustees were entitled to qualified immunity with regard to the claim that they improperly commingled and used § 5(f) funds to pay the OHA's operating expenses.[4] The district court, however, denied the trustees immunity as to the claims that the trustees managed, administered, and expended § 5(f) funds for the Single Definition Referendum, in violation of the Admission Act. The district court then granted the trustees' motion for a stay pending this interlocutory appeal.

I. *Standing to bring a § 1983 cause of action*

Before proceeding to address the question raised on this interlocutory appeal, we must determine whether there is standing. *City of South Lake Tahoe v. California Tahoe*, 623 F.2d 231, 233, (9th Cir.) (citation omitted) ("Standing is a necessary element of federal-court jurisdiction.), *cert denied*, 449 U.S. 1039 (1989). There-

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[4] The parties do not appeal this decision.

fore, as a threshold issue, we first turn to the trustees' contention that Price lacks standing to bring a § 1983 cause of action based on the Admission Act. The issue is two-fold: (1) whether Price has standing; and (2) whether Price may bring a § 1983 cause of action based on the Admission Act.

A.

The trustees argue that Price does not have standing because of the Supreme Court's rational in *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130 (1992). We disagree. *Lujan* involved a challenge to a new regulation interpreting § 7 of the Endangered Species Act of 1973 ("ESA") to apply only within the United States or on the high seas. Specifically, plaintiffs filed an "action against the Secretary of the Interior, seeking a declaratory judgment that the new regulation is in error as to the geographic scope of § 7(a)(2), and an injunction requiring the Secretary to promulgate a new regulation restoring the initial interpretation." *Id.* at 2135. The Court found plaintiffs failed to show standing to enforce the ESA.

The Court set out a three-part test and stated that a plaintiff has standing if: (1) plaintiff suffered an "actual or imminent" injury; (3) there is a "causal connection between the injury and the conduct complained of;" and (3) that injury will likely be "redressed by a favorable decision," *Id.* at 2136. Whether a plaintiff is the object of the action at issue will affect the standing analysis:

> When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or foregone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it. When, howev-

> er, as in this case, a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed.

Id. at 2137.

The Court determined that it was dealing with the latter situation. It then applied the standing requirements strictly where a "plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*." 112 S.Ct. at 2137.

The present case, unlike *Lujan*, does not involve a suit against government for promulgating an unlawful regulation or for failing to promulgate a regulation. Rather, Price is among the class of § 5(f) beneficiaries whose welfare is the object of the action at issue. Therefore, there is "little question that the [trustees'] action or inaction has caused him injury, and that a judgment preventing or requiring action will redress it." *Id.*[5] Moreover, we have held that "Price, as a native Hawaiian, has standing to seek redress for past violations of § 5(f)." *Akaka I*, 928 F.2d at 827 n.2. The Supreme Court's rationale in *Lujan* does not compel a different result. Price has standing.

B.

In light of the Supreme Court's recent decision in *Suter v. Artist M.*, 112 S.Ct. 1360 (1992), the trustees argue that § 1983 claims based on the Admission Act simply cannot be brought. This argument fails unless *Suter* overruled our prior decision in *Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Comm'n*, 739 F.2d 1467, 1472, (1984) ("*Keaukaha II*"), where we held that

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[5] Previously, we stated that "Price, as a native Hawaiian, has standing to seek redress for past violations of § 5(f) even though that redress may not necessarily benefit native Hawaiians. *Akaka I*, 928 F.2d at 827 n.2.

a § 1983 cause of action may be brought under the Admission Act.

The issue in *Suter* was "whether private individuals have the right to enforce by suit a provision of the Adoption Assistance and Child Welfare Act of 1980 (Adoption Act or Act) either under the Act itself or through an action under 42 U.S.C. § 1983." 112 S.Ct. at 1363 (citation and footnote omitted). As to the § 1983 issue, the *Suter* Court states:

> In *Maine v. Thiboutot*, 448 U.S. 1 (1980), we first established that § 1983 is available as a remedy for violations of federal statutes as well as for constitutional violations. We have subsequently recognized that § 1983 is not available to enforce a violation of a federal statutes "where Congress has foreclosed such enforcement of the statute in the enactment itself and where the statute did not create enforceable rights, privileges, or immunities within the meaning of § 1983."

Id. at 1366 (parallel citations omitted) (quotation omitted). The Court then stated that "[s]ection 1983 speaks in terms of 'rights, privileges, or immunities,' not violations of federal law," *id.* at 1367 (quotation omitted), and concluded that the Adoption Act does not create a federally enforceable right under § 1983. *Id.* at 1370.

The trustees argue that, as in *Suter*, § 1983 claims may not be brought to challenge violations of the Admission Act because the Admission Act does not create a federally enforceable right. We disagree. The instant case involves a public trust,[6] and under basic trust law principles, beneficiaries have the right to "maintain a

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[6] As stated before, under the Admission Act, the United States and Hawaii entered into a compact whereby the United States granted Hawaii title to all § 5(f) lands and Hawaii agreed to hold the § 5(b) lands as a public trust. Hawaii Admission Act of 1959, Pub. L. 86-3, 73 Stat 4, §§ 4 and 5.

suit (a) to compel the trustee to perform his duties as trustee; (b) to enjoin the trustee from committing a breach of trust; [and] (c) to compel the trustee to redress a breach of trust." Restatement 2d of the Law of Trusts, § 199; *see also id.* at § 200, comment a ("Normally a suit against a trustee to enforce the trust or to enjoin or obtain redress for a breach of trust is brought by a beneficiary.") We have accordingly held that "allowing Price to enforce § 5(f) is consistent with the common law of trusts, in which one whose status as a beneficiary depends upon the discretion of the trustee nevertheless may sue to compel the trustee to abide by the terms of the trust." *Akaka I*, 928 F.2d at 826-27.

Our decisions in *Keaukaha II*, 739 F.2d at 1472, and *Akaka I*, 928 F.2d at 828, holding that beneficiaries of the public trust created by Congress may bring a § 1983 claim are consistent with the Supreme Court's decision in *Suter*. Congress enacted the Admission Act, a federal public trust, which by its nature creates a federally enforceable right for its beneficiaries to maintain an action against the trustee in breach of the trust. As a beneficiary, Price may therefore bring a § 1983 action under the Hawaii Admission Act against the trustees.

II. *Qualified Immunity*

As the Supreme Court stated in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818 (citations omitted). In ruling that the trustees' use of § 5(f) monies to fund the Single Definition Referendum violated clearly established law the district court stated:

> First, § 5(f) provides for management and disposition of the funds in accordance with the five purposes set forth therein "in such manner as the constitution

> and laws of said State may provide." In accordance with this directive, the State in establishing OHA, statutorily provided that the public trust funds appropriated to OHA would *only* be used for the benefit of native Hawaiians.
>
> Further, the Attorney General opinion issued in 1983 unequivocally advised OHA that the Hawaii legislature could not authorize the use of § 5(f) funds to better the conditions of Hawaiians. Accordingly, this court finds that the contours of the law in 1988 was "sufficiently clear that a reasonable official would understand that what he was doing violates that right." Therefore, if § 5(f) funds were used to advance the single definition referendum, defendants would not be entitled to qualified immunity for their actions

(Emphasis added) (internal citation and quotation omitted).

First of all, an Attorney General's opinion cannot by itself establish "clearly established law." *See Cedar Shake and Shingle Bureau v. City of Los Angeles*, No. 91-56727, slip op. 6679, 6691 (9th Cir. June 30, 1993) (the courts are not bound by an Attorney General's opinions, although they are generally regarded as highly persuasive); *Price II*, 921 F.2d at 957 (the Attorney General's opinion regarding the use of § 5(f) funds in the hands of OHA had no affect on the court's analysis); *Guardian Plans Inc. v. Tague*, 870 F.2d 123, 129, (the Cir.) (Attorney General's opinion "does not have the force of law"), *cert. denied*, 493 U.S. 882 (1989); *Nicholson v. Gant*, 816 F.2d 591, 595, (9th Cir. 1987) (The Attorney General's opinion "is not law and not binding").

Secondly, there is no clearly established law prohibiting the OHA trustees from expending § 5(f) funds in support of the Single Definition Referendum which questioned the 50% or more blood quantum requirement for native Hawaiian status. The restriction of section 5(f), incorporating the HHCA definition and confining the

"betterment" purpose[7] of the lands trust funds to those of 50% or more blood, remains in place as governing federal law.[8] *See Hoohuli v. Ariyoshi*, 630 F.Supp. 1153, 1160 n.31 (D.Haw. 1986). While actually changing the definition of native Hawaiian contained in the HHCA, or the administration of OHA programs in conformance with a revised definition, would violate clearly established federal law, the Referendum did not do so. The OHA trustees reasonably believed that a referendum to determine Hawaiian opinion on the proper definition of "native Hawaiian" was for the "betterment of the conditions of native Hawaiians" as presently defined. *See Hoohuli*, 631 F.Supp. at 1161 (evidence showed "that the rationale for defining 'native Hawaiian' in the HHCA in 1920 had become outmoded" and that "defining 'Hawaiian' to include all people of aboriginal blood could help alleviate divisiveness in the Hawaiian community resulting from blood quantum restrictions); *Kepo'o v. Burgess*, No. 88-2987-09 (Haw. 1st Cir. 1988) (In an order denying a motion for preliminary injunction, Judge Milks found that there was no evidence that the Single Definition Referendum would not be for the betterment of conditions of native Hawaiians and that such Referen-

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[7] Section 5(f) of the Admission Act states that the § 5(b) lands «shall be held by [Hawaii] as a public trust for the support of the public schools and other public educational institutions, for the *betterment of the conditions of native Hawaiians*, . . . , for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use.» (Emphasis added). *See also Price v. State of Hawaii*, 764 F.2d 623, 625, (9th Cir. 1985) («*Price I*») («Proceeds from the section 5(f) trust are to be devoted to 'one or more' of the five statutory purposes, one of which is 'for the betterment of the conditions of native Hawaiians.'», *cert. denied*, 474 U.S. 1055 (1986).

[8] Also remaining in place are the restrictions placed by section 4 of the Admission Act on the «homelands,» which are not part of the trust administered by the OHA. *See Price I*, 928 F.2d at 826 n.1.

dum is "one of many ways to achieve the betterment of the conditions of native Hawaiians even though all Hawaiians would benefit.")[9]

Moreover, in 1978, the Hawaii legislature directed the OHA to address the issue of whether the blood quantum requirement should be amended. *See* Stand. Comm. Rep. No. 59, Hawaii Constitutional Convention of 1978, Vol. I, at 644 ("Although your Committee was tempted to change this outmoded [blood quantum] rule from the 1920s, your Committee concluded that this responsibility should be assumed by the Office of Hawaiian Affairs.").

Thus, the OHA trustees, were entitled to qualified immunity as to Price's claims that they violated the Admission Act by improperly managing, administering, and expending § 5(f) funds for the Single Definition Referendum.[10]

CONCLUSION

We AFFIRM the district court's determination that Price has standing to bring a § 1983 cause of action based on the Admission Act and REVERSE the district court's ruling that the trustees were not entitled to qualified immunity.

AFFIRMED in part, and REVERSED in part.

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[9] The case ultimately was affirmed in a memorandum decision by the Hawaii Supreme Court, No. 88-2987 (1991).

[10] Because we find that trustees are entitled to qualified immunity we do not reach the question of whether the trustees are also entitled to absolute immunity.

APPENDIX "B"

Civil No. 88-00773 DAE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

DOCTOR NUI LOA PRICE, A.K.A. MAUI LOA, individually and in his capacity as chief of the Hou Hawaiians, THE HOU HAWAIIANS, a native Hawaiian Ohana, and KAMUELA PRICE, individually, and in his capacity as member of the council of the Hou Hawaiians,
Plaintiffs,

vs.

MOANIKEALA AKAKA, ROD BURGESS, CLARENCE CHING, FRENCHY DESOTO, LOUIS HAO, MANU KAHAIALII, THOMAS KALUKUKUI, SR., MOSES KEALE, SR., and KEVIN MAHOE,
Defendants.

Filed in the United States District Court, District of Hawaii

June 12, 1992 at 11 o'clock and 10 min. a.m.

Walter A. Y. H. Chinn, Clerk

ORDER GRANTING IN PART AND DENYING IN PART MOTION FOR JUDGMENT ON THE PLEADINGS, OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT, AND DENYING MOTION TO AMEND COMPLAINT, AND MOTION TO STRIKE EXHIBITS, MOTION FOR SANCTIONS

Defendants Moanikeala Akaka, Rod Burgess, Clarence Ching, Frenchy DeSoto, Louis Hao, Manu Kahaialii, Thomas Kalukukui, Sr., Moses Keale, Sr., and Kevin Mahoe's ("defendants") motion for judgment on the pleadings, or in the alternative for summary judgment and conditional motion for stay, and plaintiffs Nui Loa Price, a.k.a. Maui Loa, the Hou Hawaiians and Kamuela Price's ("plaintiffs") motions to amend complaint, to strike exhibits and for sanctions came on for hearing

before this court on December 27, 1991, and April 20, 1992. Steven S. Michaels, Esq. appeared on behalf of defendants; Walter R. Schoettle, Esq. appeared on behalf of plaintiffs Maui Loa and the Hou Hawaiians; Kamuela Price appeared *pro se*.[1] The court having considered the moving papers, the arguments of counsel and the records and files herein, hereby grants in part and denies in part defendants' motion for summary judgment, and denies all other motions.

BACKGROUND

When Hawaii achieved statehood in 1959, Congress granted to the State of Hawaii most of the Hawaiian lands to which the federal government held title. *See* Hawaii Admission Act, Pub.L. No. 86-3 ("Admission Act"), § 5(b), 73 Stat. 4, 5 (1959), as amended by the Hawaiian Omnibus Act, Pub.L. No. 86-624, 74 Stat. 411 (1960). Congress imposed the following obligations upon Hawaii with respect to these lands:

> The lands granted to the State of Hawaii by subsection (b) of this section and public lands retained by the United States under subsections (c) and (d) and later conveyed to the State under subsection (e), together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by the said State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of

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[1] Although Kamuela Price is appearing *pro se*, Mr. Schoettle advised the court at the December 27, 1991 hearing that he prepared and filed all pleadings on behalf of all plaintiffs, including Kamuela Price, in this action.

> lands for public use. *Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States.*

See Admission Act § 5(f) (emphasis added).

In its constitution, Hawaii accepted the trust lands and declared that it would hold a portion of the lands conveyed by § 5(b) as a "public trust for native Hawaiians and the general public." Haw. Const. art. XII, § 4. In 1978, the Hawaii legislature established the Office of Hawaiian Affairs ("OHA") to serve "native Hawaiians and Hawaiians." Haw. Const., art. XII, § 6. OHA was funded in part by granting it a share of the trust income created out of the § 5(b) lands. Haw. Rev. Stat. § 10-3.[2] Defendants are current or former trustees of OHA.

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[2] § 10-3, as it existed in 1988, identified the purposes of OHA, which included the betterment of conditions of native Hawaiians and Hawaiians. With regard to the betterment of conditions of native Hawaiians, the statute provided:

> **Purpose of the office.**
>
> The purposes of the office of Hawaiian affairs include:
>
> (1) The betterment of conditions of native Hawaiians. A pro rata portion of all the funds derived from the public land trust shall be funded in an amount to be determined by the legislature for this purpose, and *shall be held and used solely as a public trust for the betterment of the conditions of native Hawaiians.*

(emphasis added). § 10-13.5, which provided for the use of public land trust proceeds, provided:

> **Use of public land trust proceeds.**
>
> Twenty per cent of all funds derived from the public land trust, described in section 10-3, shall be expended by the office, as defined in section 10-2 [definition of "office" means OHA] for the purposes of this chapter.

Chapter 10 was amended effective July 3, 1990, and applicable retroactively to June 16, 1980. § 10-3 was revised to only refer to the

(continued...)

On October 18, 19[88], plaintiffs[3] filed the complaint herein alleging that defendants violated 42 U.S.C. § 1983 by managing income derived from § 5(b) lands in a manner that contravenes § 5(f) of the Admission Act. Specifically, plaintiffs contend that defendants commingled OHA' share of income from the § 5(f) trust with other OHA funds; and that defendants have expended portions of that income other than to benefit native Hawaiians, and that in particular, have used portions of that income for the benefit of persons denominated as "Hawaiians."[4] *See* Complaint, ¶¶ 14-16.

On January 11, 1989, this court granted defendants' motion to dismiss the complaint and held that the complaint failed to state a claim because the Admission Act did not impose the obligations which plaintiffs assert were violated, and because the suit was against defendants in their official capacities and therefore barred by the Eleventh Amendment. Judgment was entered in

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[2](...continued)
purposes of OHA; references to use of public trust funds was deleted. § 10-13.5 was amended as follows:

Use of public land trust proceeds.

Twenty per cent of all revenue derived from the public land trust shall be expended by the office for the betterment of the conditions of native Hawaiians.

[3] Plaintiff The Hou Hawaiians is alleged to be a native Hawaiian Ohana or tribe made up of related families of native Hawaiians of 50% or more Hawaiian ancestry. Plaintiff Doctor Nui Loa Price is alleged to be a hereditary chief of the Hou Hawaiians and a native Hawaiian. Plaintiff Kamuela Price is alleged to be a member of the elder council of the Hou Hawaiians. Complaint, ¶ 2.

[4] Under both the Hawaiian Homes Commission Act § 201-7 and Hawaii Revised Statutes § 10-2, «native Hawaiian» is defined as any descendant «of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778 . . . .»

«Hawaiian» is defined under Hawaii Revised Statutes § 10-2 as «any descendant of the aboriginal peoples inhabiting the Hawaiian Islands . . . in 1778.»

favor of defendants on January 17, 1989, and plaintiffs appealed.

On March 21, 1991, the Ninth Circuit reversed the judgment of this court. The Ninth Circuit held that plaintiffs stated a claim under 42 U.S.C. § 1983 for violations of § 5(f) by alleging in their complaint that defendants have expended the trust income on purposes other than those listed in § 5(f). *Price v. Akaka*, 928 F.2d 824, 826, (9th Cir.), *cert. denied* 112 S.Ct. 436 (1991). The Ninth Circuit also held that although the complaint did not state that the plaintiffs were suing the trustees in their individual capacity, the complaint would be so construed because plaintiffs were suing defendants for money damages. *Id.* at 828. Accordingly, the Ninth Circuit found that the action was not barred by the Eleventh Amendment. *Id.*

On remand, defendants have filed an answer to the complaint, and now move to dismiss the action on several alternate grounds as follows: (1) that either judgment on the pleadings or summary judgment is appropriate because plaintiffs' claims fail on the merits, (2) defendants are entitled to qualified immunity, (3) defendants are entitled to absolute immunity, and (4) § 5(f) is unenforceable via 42 U.S.C. § 1983 in view of *Suter v. Artist M.*, 112 S.Ct. 1360 (1992). Plaintiffs have filed several counter motions, including a motion to amend the complaint, a motion to strike exhibits, a request for a Rule 56(f) continuance and a motion for sanctions.

DISCUSSION

As set forth above, defendants seek a dismissal of the complaint against them on several alternate grounds. The court will first address whether plaintiffs can assert a § 1983 action in view of the decision by the United States Supreme Court in *Suter v. Artist M.*

I. *Whether Plaintiffs Have Standing To Bring This Action*

On March 25, 1992, the Supreme Court rendered its opinion in *Suter v. Artist M.*, 112 S.Ct. 1360 (1992). In that case, the Supreme Court held that the Adoption Assistance and Child Welfare Act of 1980 ("The Act"), a federal spending law, did not create enforceable rights under 42 U.S.C § 1983.

The Act established a federal reimbursement program for certain expenses incurred by the States in administering foster care and adoption services. One of the requirements of the Act was that the States make reasonable efforts to prevent removal of children from their homes and to facilitate reunification of families where removal had occurred. 42 U.S.C. § 671(a)(15).

The Seventh Circuit held that the Act contained an implied right of action, and that respondents could enforce this section of the Act through an action brought under § 1983 as well. The Supreme Court reversed, holding that the Act did not create an enforceable right on behalf of the plaintiffs.

The Court stated that the relevant issue was whether the Act "unambiguously confer[red] upon the child beneficiaries of the Act a right to enforce the requirement that the State make 'reasonable efforts' to prevent a child from being removed from his home, and once removed to reunify the child with his family." 112 S.Ct. at 1367.

In resolving the question, the Court first noted that Congress had left up to the States how it was to comply with the directive that it make "reasonable efforts," and that other sections of the Act provided enforcement mechanisms for the reasonable efforts clause, including the authority vested in the Secretary of Health and Human Services to reduce or eliminate payments to the State on finding that the State was not complying with the Act. The Court stated that while "these statutory

provisions may not provide a comprehensive enforcement mechanism so as to manifest Congress' intent to foreclose remedies under § 1983, they do show that the absence of a remedy to private plaintiffs under § 1983 does not make the reasonable efforts clause a dead letter." 112 S.Ct. at 1368-69.

The Court concluded:

> Careful examination of the language relied upon by respondents, in the context of the entire Act, leads us to conclude that the "reasonable efforts" language does not unambiguously confer an enforceable right upon the Act's beneficiaries. The term "reasonable efforts" in this context is at least as plausibly read to impose only a rather generalized duty on the State, to be enforced not by private individuals, but by the Secretary in the manner previously discussed.

Id. at 1370. Having concluded that the Act did not create a federally enforceable right to "reasonable efforts" under § 1983, the Court then turned to whether an implied right of action for private enforcement existed. The Court stated:

> Under the familiar test of *Cort v. Ash*, 422 U.S. 66 (1975), the burden is on respondents to demonstrate that Congress intended to create the private remedy sought by the plaintiffs. *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-16 (1979) ("[W]hat must ultimately be determined is whether Congress intended to create the private remedy asserted."). As discussed above, we think that Congress did not intend to create a private remedy for enforcement of the "reasonable efforts" clause.
>
> We conclude that 42 U.S.C. § 671(a)(15) neither confers an enforceable private right on its beneficiaries nor creates an implied cause of action on their behalf.

Id. The dissent in *Suter* pointed out that the Court's decision was plainly inconsistent with its previous cases addressing § 1983 enforcement. *See id.* at 1371 (Blackmun, J., dissenting). Justice Blackmun stated that the majority reached its conclusion "without even stating, much less applying, the principles our precedents have used to determine whether a statute has created a right unenforceable under § 1983." *Id.*

Based on *Suter*, defendants argue that *Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission*, 739 F.2d 1467, (9th Cir. 1984) ("*Keaukaha II*") and its progeny is no longer good law. In *Keaukaha II*, the Ninth Circuit held that § 5(f), although not encompassing an implied right of action, did allow for a 1983 action. The Court found that the enforcement device provided by § 5(f) was not so comprehensive as to signal preclusion of a § 1983 action asserting violations of § 5(f).

Defendants argue that *Suter* is directly at odds with *Keaukaha II* because § 5(f) does not "unambiguously confer" upon native Hawaiian beneficiaries the right to sue for violations of the Admissions Act; further, defendants argue that the Admissions Act provides a federal enforcement mechanism in the form of a suit by the United States, and therefore, as in *Suter*, the absence of a private remedy does not make the requirements of § 5(f) unenforceable.

In *Keaukaha II*, the Ninth Circuit specifically found under then established Supreme Court precedent, that the enforcement devices of the Admission Act were not comprehensive enough to signal preclusion of a section 1983 remedy. Although as pointed out by Justice Blackmun in his dissent, *Suter* appears to disregard, without explanation, established law, *Suter* did not overrule any previous authority, and in fact, was limited to the issue of whether the Adoption and Assistance

Child Welfare Act of 1980 created an implied right of action or federally enforceable right under § 1983.

And while this court acknowledges that the Supreme Court in *Suter* appears to have retreated from prior precedent, in the absence of an overruling of prior precedent, this court cannot disregard the Ninth Circuit's ruling in *Keaukaha II*, and the direct mandate to this court that plaintiffs in this case have stated a claim under § 5(f) of the Admission Act that is enforceable via § 1983.[5]

II. *Whether Plaintiffs' Claims Are Barred By Qualified Immunity*

In *Harlow v. Fitzgerald*, 102 S.Ct. 2727 (1982), the United States Supreme Court held that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 2738. The Court stated:

> Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as

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[5] The Ninth Circuit specifically held that plaintiffs have standing to bring the instant action. *Price v. Akaka*, 928 F.2d 824, 826 n.2, (9th Cir. 1991).

> unlawful. Until this threshold immunity question is resolved, discovery should not be allowed. If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained. But again, the defense would turn primarily on objective factors.

Id. Further, in *Anderson v. Creighton*, 107 S.Ct. 3034 (1987), the Court stated:

> It should not be surprising, therefore, that our cases establish that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, see *Mitchell*, 472 U.S., at 535, n. 12, 195 S.Ct, at 2829, N.12; but it is to say that in the light of preexisting law the unlawfulness must be apparent. (citations omitted).

Id. at 3039. The critical question is therefore whether the defendants' conduct violated clearly established law at the time that conduct occurred. *Harlow* at 2738; *Mitchell v. Forsyth*, 195 S.Ct. 2806, 2818 (1985)

The court must first determine what conduct plaintiffs are alleging as violative of their rights. The complaint alleges that defendants violated 42 U.S.C. § 1983 by managing income derived from § 5(b) lands in a manner that contravenes § 5(f) of the Admission Act. Plaintiffs contend that defendants have commingled OHA's share of income from the § 5(f) trust with other

OHA funds and that defendants have expended portions of that income other than to benefit native Hawaiians, and have particularly used portions of that income for the benefit of persons denominated as Hawaiians.

At the December 27, 1991 hearing on this matter, plaintiffs stated that the specific wrongful conduct known at this time was the alleged use of § 5(f) funds to fund a nonbinding mail-out referendum initiated by the trustees in November of 1988. Plaintiffs also stated that the combined revenue expenditure balance sheets for OHA for the years 1982 through 1986 evidenced a transfer of monies from the § 5(f) fund into OHA's general fund, and that these balance sheets establish that § 5(f) funds were thus improperly used to benefit all of OHA's beneficiaries.[6]

A. *Whether the Use Of § 5(f) Monies to Fund the Single Referendum Issue Violated Clearly Established Law*

Plaintiffs challenge OHA's use of § 5(f) funds to fund a nonbinding mail-out referendum in November of 1988. The referendum was proposed by OHA to determine whether their constituents' favored an amendment of the definition of native Hawaiians to include all Hawaiians. Defendants accordingly sought to use § 5(f) funds for this referendum, as they felt that adoption of a single

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[6] Defendants objected at the hearing to plaintiffs arguing that the transfers of these funds into the OHA general fund was part of their claim in this case. Defendants state that throughout this litigation, and including plaintiffs opposition to defendants' writ of certiorari to the United States Supreme Court, plaintiffs have limited their claim to the use of § 5(f) funds to fund the referendum. Accordingly, defendants did not brief summary judgment on the issue of commingling § 5(f) funds with OHA general funds. Because the issue had not been briefed by either party, the court requested additional briefing from the parties on this limited issue and set the matter for further hearing on April 29, 1992. The court heard the parties' argument on the additional claim which is now properly before this court.

definition would better the condition of native Hawaiians, in that the blood quantum requirement had long been recognized as the single most divisive issue in the Hawaiian community.[7]

Plaintiffs state that the law was clear that § 5(f) permits income from the trust to be used only for the five enumerated purposes therein and expressly provides that use of said funds for any other purpose shall constitute a breach of trust. Accordingly, plaintiffs contend that OHA's use of such funds to benefit both native Hawaiians *and* Hawaiians is a violation of the law which is expressly set forth in § 5(f). Plaintiffs also point to Chapter 10 of the Hawaii Revised Statutes which governs OHA's handling of the pro rata portion of funds from the public land trust, which expressly provides that such funds are to be "held and used solely as a public trust for the betterment of the conditions of native Hawaiians." Haw. Rev. Stat. § 10-3.[8]

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[7] In *Hoohuli v. Ariyoshi*, 631 F.Supp. 1153 (D.Haw. 1986), the court discussed the blood quantum requirement and the divisive effect it had on the Hawaiian community. The court noted that there was evidence before the Hawaii legislature indicating that «defining 'Hawaiian' to include all people of aboriginal blood could help alleviate divisiveness in the Hawaiian community resulting from blood quantum restrictions.» 631 F.Supp. at 1161.

[8] In fact, plaintiffs argue that the law was so clearly established on the face of the Admissions Act, that this case does not even involve discretionary functions on the part of public officials. This court, however, finds this argument unpersuasive. In *Davis v. Scherer*, 194 S.Ct. 3012, 3020 n. 14 (1984), *reh'g denied* 195 S.Ct. 26 (1984), the Supreme Court held that «[o]fficials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision.» *Id.* at 3019. The Court stated that as acknowledged in *Harlow*, officials may lose their immunity by violating «clearly established statutory . . . rights.» *Id.* n. 12 (citing *Harlow*, 102 S.Ct. at 2738). However, «[a] law that fails to specify the precise action that the official must take in each instance created only discretionary authority; and that

(continued...)

Plaintiffs contend that Attorney General Opinion No. 83-2 dated April 15, 1983, likewise interpreted the literal language of § 5(f) to prohibit the use of public trust funds other than to benefit native Hawaiians. In this opinion, the Attorney general of the State of Hawaii[9] answered the following question posed by OHA:

> By letter dated March 15, 1983, you requested our opinion on the following question:
>
> May the legislature, consistent with Section 5(f) of the Admission Act and Article XII of the State Constitution, authorized [sic] OHA to use funds derived from the Public Land Trust (Section 5(f) of the Admission Act) to better the conditions of Hawaiians as defined in Hawaii Revised Statutes, Section 10-2(5)?
>
> We answer in the negative.

See Exhibit R to Exhibit R to defendants' motion. Plaintiffs accordingly contend that defendants are not entitled to qualified immunity because the law was clearly established as far back as 1983 that § 5(f) funds could not be used to better the conditions of Hawaiians.

Defendant preliminarily argue that it was not "clearly established" during the years in question that a disposition of § 5(f) revenue to OHA was a disposition under § 5(f) that continues further federal judicial supervision over grantee activities. Defendants state that prior to the Ninth Circuit opinion in this case, the Ninth Circuit had rejected plaintiffs' procedural claims in a virtually identical context, citing to *Price v. State of Hawaii*, 921

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[8](...continued)
authority remains discretionary however egregiously it is abused.› *Id.* at 3020, n. 14. The court finds that § 5(f) fails to specify the precise action an official must take and therefore, creates only discretionary authority.

[9] The letter was signed by then Deputy Attorney General Charlotte E. Libman, and signed ‹Approved› by then Attorney General Tany B. Hong.

F.2d 950 (9th Cir. 1990).[10] The Ninth Circuit in *Price v. State of Hawaii*, however, did not find that an expenditure of § 5(f) funds for other than the purposes enumerated therein was acceptable, but rather found that a bare allegation of misappropriation of funds without

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[10] In that case, the same plaintiffs brought an action against various state defendants claiming that the State and its officials were in violation of § 5(f) of the Admissions Act because they failed to keep the ceded lands, and the income from those lands, segregated from other state assets and income, and because they had scattered those lands among various departments and agencies of the State, and failed to invest prudently. 921 F.2d at 954. The Ninth Circuit noted that the language of § 5(f) expressly provides that the State is to have the power to manage the property and its income in a manner that the constitution and laws of the State provide, and held that it was not for the federal courts to declare that certain methods of holding, managing and accounting for the ceded lands and income must be followed by the State. *Id.* at 956. The Court stated:

> It follows that the appellants cannot succeed on their claims that section 5(f) has been violated simply because the State has commingled the ceded lands and their income with other lands and income, or because it has not invested in what appellants deem to be a prudent manner, or because the lands are in the hands of various departments and agencies of the State. As we noted in *Price v. Akaka*, as long as the lands or income remain in the hands of the State they remain impressed with the public trust created by the Act. 915 F.2d 472. It is true that we would lift our eyebrows were a private trustee to commingle trust funds committed to its administration, but that does not suggest that we should find that the State and its officials have violated section 5(f) when *they* do so.
>
> That does not mean that the State can do what it likes with the property and the income. Rather, the federal courts must ultimately determine whether the property has been diverted from section 5(f) purposes. That would, however, have to be in the context of litigation brought by the United States under section 5(f) or in the context of private litigation under Section 42 U.S.C. § 1983 which focused on some particular diversion. The action by these very appellants in *Price v. Akaka* is precisely that kind of litigation.

Id. at 956.

focus on any particular diversion was not sufficient to state a claim. Further, the decision in *Price v. State of Hawaii* was rendered in 1990 and the court does not see how this decision is dispositive of "whether the law was clearly established at the time an action occurred." *Harlow*, 192 S.Ct. at 2738.

Further, defendants argue that the decision in *Kepoo v. Burgess*, No. 88-2987-09, an action filed in the First Circuit Court of the State of Hawaii in September 1988, is dispositive of the qualified immunity issue in this case. Plaintiffs in that action brought suit against the trustees of OHA, Governor John Waihee and the State of Hawaii arising out of the 1988 referendum which is the subject of this action. Plaintiffs contended that the trustees breached their fiduciary duty to administer the income from the § 5(f) trust by advocating a single beneficiary class definition of native Hawaiian, and expending special trust fund monies to inform and educate their constituents about the single definition referendum. Summary judgment was granted in favor of the trustees in that case. Although the order granting the trustees motion for summary judgment did not specify the basis of the court's ruling, a previous order denying plaintiffs' motion for preliminary injunction indicated that the court found that no § 5(f) funds were expended on the single definition referendum. The Hawaii Supreme Court affirmed the lower court decision in a memorandum opinion on November 21, 1989. The court, without discussing the basis of its ruling, stated that it found no reversible error on the record before it, however, the court expressed disagreement with the state's assertion that the legislature could alter the intended purposes of the section 5(f) trust. Defendants argue that while the unpublished *Kepoo* decision cannot be cited for precedential value, the result establishes that defendants have not violated clearly established law by their actions in the present case. Since the *Kepoo* decision was rendered after the conduct alleged as

wrongful in this case occurred, this court does not find *Kepoo* dispositive on the qualified immunity issue. Further, even considering the entire *Kepoo* record submitted, the court finds that the record itself is less than clear as to the basis for the unpublished ruling.

Defendants also argue that the law with regard to the use of § 5(f) monies to fund the single definition referendum was not clearly established in 1988 as shown by the numerous opinions on the subject obtained from the State Attorney General's Office and OHA's own counsel. For example, OHA's own counsel opined in July 12, 1988 that the use of such funds would be proper if a benefit to the trust beneficiaries could be shown. *See* Exhibit J to Exhibit O of defendant's motion.

Further, defendant Moses Keale, Sr. requested an opinion from the State Attorney General as to the appropriateness of using § 5(f) funds to finance the referendum in July 1988. Specifically, Mr. Keale requested an opinion as to whether special funds derived from the public land trust and set aside to be held and used solely as a "public trust for the betterment of conditions of native Hawaiians", section 10-3(1), HRS, could properly be expended to advocate a change in existing law to create a single definition of the term "native Hawaiian" to include "Hawaiians" as the term is defined in section 10-2.

On July 28, 1988, the Attorney General's Office advised OHA that the use of special funds for the purpose of bettering the conditions of all Hawaiian people, rather than just native Hawaiians would not be proper. The letter from the Attorney General[11] provided in relevant part:

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[11] The letter was signed by then Deputy Attorney General Charlotte E. Libman and signed ‹Approved› by Attorney General Warren Price, III.

> Thus, we conclude that the use of funds derived from the ceded land funds to advocate a change in the law to provide for a single definition, is not a use *solely* for the betterment of conditions of native Hawaiians. Furthermore, such a use is inconsistent with the foremost goal to be pursued by OHA, the betterment of conditions of native Hawaiians.

See Exhibit S to Exhibit R to defendants' motion.

The Attorney General's Office subsequently conducted a formal investigation into the expenditure of native Hawaiian public trust funds by OHA, and issued an investigative report on November 2, 1988. The Attorney General's Office discussed the specific expenditures of public trust funds for the single issue referendum[12] and concluded that none of the expenditures warranted any legal action for breach of trust. The Attorney General found that the funds that had actually been expended did in fact benefit native Hawaiians, and that the OHA trustees acted reasonably and prudently in advocating the single definition of Hawaiian. However, the Attorney General also recommended that OHA not use any further public trust funds where the single issue is involved. *See* Exhibit 1 to Exhibit Q to defendants' motion.

This court finds that the law was sufficiently clear in 1988 that a reasonable official would understand that the expenditure of § 5(f) funds to benefit non-native Hawaiians was a violation of § 5(f). First, § 5(f) provides for management and disposition of the funds in accordance with the five purposes set forth therein "in such manner as the constitution and laws of said State may

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[12] This included appropriations of $23,200 for a media/public relations campaign to educate OHA beneficiaries and to advocate ratification the single definition referendum, $10,000 as part of a "protocol" fund for the Ad Hoc Committee working on the proposed referendum, and $57,000 for a professional advertising campaign.

provide." In accordance with this directive, the State in establishing OHA, statutorily provided that the public trust funds appropriated to OHA could only be used for the benefit of native Hawaiians. *See* footnote 2, *supra.*

Further, the Attorney General opinion issued in *1983* unequivocally advised OHA that the Hawaii legislature could not authorize the use of § 5(f) funds to better the conditions of Hawaiians. Accordingly, this court finds that the contours of the law in 1988 was "sufficiently clear that a reasonable official would understand that what he was doing violates that right." *Anderson,* 197 S.Ct. at 3039. Therefore, if § 5(f) funds were used to advance the single definition referendum, defendants would not be entitled to qualified immunity for their actions.

B. *Whether Defendant Violated Clearly Established Law By Transferring Trust Funds Into The OHA General Fund*

Plaintiffs submitted the Combined Statement of Revenues, Expenditures, and Changes in Fund Balances of OHA for the fiscal years 1982 through 1986 in opposition to the instant motion. Plaintiff states that these balance sheets establish that OHA is commingling § 5(f) funds with OHA general funds and that the *expenditure of § 5(f) funds* for the benefit of Hawaiians in general, as distinguished from native Hawaiians constitutes a specific breach of federal law.[13] Plaintiff accord-

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[13] At page 34 of the exhibit submitted by plaintiffs, there is shown a «use» of Special Fund Revenues of $589,366 denoted as and «Operating transfer out» and a «financing source» in the general funds managed by OHA of $583,322» in the «other financing sources» category of the financial statement, in the amount of $583,332. *See* Exhibit E to the Declaration of Walter R. Schoettle In Opposition To Defendants' Motion For Judgment On The Pleadings, Or, In The Alternative For Summary Judgment, And conditional Motion For Stay, filed herein on December 13, 1991.

ingly attempts to distinguish *Price v. State of Hawaii* discussed in footnote 10 above.[14]

Defendants initially argue that plaintiffs have failed to plead the alleged violations with regard to the commingling of trust and OHA general funds with the specificity as required by *Branch v. Tunnell*, 937 F.2d 1382, 1886, (9th Cir. 1991)[15] and that therefore, the failure to dismiss this action on the basis of qualified immunity would be error. The court does not find this case to involve allegations of a constitutional tort and therefore, does not find *Branch* dispositive of this case. Further, the court finds that plaintiffs' complaint sufficiently puts the defendants on notice that plaintiffs are alleging commingling and use of § 5(f) funds for the benefit of both Hawaiians and native Hawaiians in violation of the statutory mandate.[16]

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[14] In *Price v. State*, the Ninth Circuit warned against the practice of commingling even though it held that commingling was not a breach of trust *per se*. The court stated:

> Needless to say, state officials do run a substantial risk if they so commingle assets that they cannot defend claims that improper expenditures have been made. That is particularly true when, as we have now twice held, those lands and their income remain subject to the trust while they are in the hands of state governmental entities. However, that presents no triable issue in this case.

921 F.2d at 959 (footnote omitted).

[15] The Ninth Circuit, in *Branch*, held that a heightened pleading standard applies in cases in which subjective intent is an element of a constitutional tort action. The court stated that bare allegations of improper purpose are insufficient to subject government officials to discovery and the related burdens of defending a lawsuit, and that to survive a motion to dismiss, «plaintiffs must state in their complaint nonconclusory allegations setting forth evidence of unlawful intent.» 937 F.2d at 1386. *Branch* was a *Bivens* action alleging judicial deception by government agents in obtaining a search warrant.

[16] The Complaint specifically alleges:

(continued...)

Defendants state that the transfer of trust funds into the OHA general fund does not constitute a violation of clearly established law because the Hawaii state legislature has directed OHA to use special funds to pay for a portion of the operating expenses of OHA. In this regard, defendants point to the legislative Act which appropriates funds for the biennial budget of OHA. For example, with respect to Fiscal year 1985, the Legislature, in the Act of July 1, 1985, Ch. 193, 1985 Haw. Sess. L. 328, expressly directed that "[t]he Office of Hawaiian Affairs and the State of Hawaii shall share equally in the costs of fringe benefits paid for employees of the Office of Hawaiian Affairs." *See* Attachment 2 to defendants' supplemental memorandum filed herein on March 2, 1992, § 6.

The court finds that the use of § 5(f) funds to pay for a portion of the operating expenses of OHA does not violate clearly established law. In fact, the clearly established state law requires the use of matching funds to pay the operating costs of OHA's offices. Because

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[16](...continued)

14. On information and belief, Defendants have not held the TRUST INCOME and income therefrom separate and apart from the other funds held by Defendants; and have failed to manage and dispose of the TRUST INCOME and reinvest the income therefrom in a reasonably prudent manner towards the purposes and uses enumerated by Congress and in particular for the betterment of persons of 50 percent or more Hawaiian ancestry.

15. On information and belief, Defendants have commingled the TRUST INCOME and income therefrom with other funds of said Defendants.

16. On information and belief, Defendants have expended portions of the TRUST INCOME for uses and purposes other than those purposes permitted by § 5(f) of the Admission Act, and in particular, have expended said TRUST INCOME for the benefit of persons denominated as «Hawaiians» who are persons of less than 50% Hawaiian ancestry and who are not beneficiaries of the § 5(f) Trust.

See Complaint filed herein on October 18, 1988.

OHA's statutorily mandated constituency consists of both Hawaiians and native Hawaiians, the Hawaii legislature has mandated that use of public trust funds also be used to fund operations. Under these circumstances, the commingling of special funds with general funds for this purpose would not be a violation of clearly established law.

III *Whether Defendants Are Entitled To Summary Judgment*

The court will next consider whether defendants are entitled to summary judgment on the merits with regard to plaintiffs' claims that § 5(f) funds were improperly expended on the single issue referendum. Defendants argue that summary judgment in their favor is appropriate on this issue because as discussed in pages 16 through 18 of this decision, the Hawaii courts have ruled on this issue in *Kepoo v. Burgess* No. 88-2987-09, and found that no such funds were expended.

Plaintiffs object to the court's application of the judgment in the *Kepoo* case to the instant action because plaintiffs were not parties to the *Kepoo* case, and because the Hawaii Supreme Court decided *Kepoo* by memorandum opinion. *See* discussion at pages 16 through 18 above. Plaintiffs state that Exhibits "E" through "R", which set forth the record in the *Kepoo* case cannot be considered by the court, and in fact should be stricken from the record. Defendants state that while the findings in the *Kepoo* case may not be binding on this court, the court can nevertheless consider the documentation submitted to the lower court in that case and make its own independent determination based on this information.

The court agrees that it can consider properly submitted evidence at any time and will consider such evidence presented to it. The court will not strike the exhibits as all of the exhibits are part of the public record in the *Kepoo* case. However, the court cannot

apply underlying evidentiary rulings made by the lower state court to plaintiffs who were not parties to that action. Further, as noted above, the record in the *Kepoo* case is less than clear as to the basis for the Hawaii court's ruling.

Turning to the merits of defendants' motion, this court is hampered in its analysis of this issue by the fact that defendants do not specifically point out what facts or evidence supports summary judgment in their favor. Rather, defendants attach the voluminous record in the *Kepoo* case and state that the lower court judge "properly found that there was no evidence to support the claim that 5(f) funds were in fact spent on the single definition issue within any time frame to which this Complaint applies." *See* Motion at p. 21.

In *Celotex Corp. v. Catrett*, 106 S.Ct. 2548 (1986), the Supreme Court stated that:

> . . . a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the "pleadings, depositions, and answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrates the absence of a genuine issue of material fact.

Id. at 2553. And while defendants do not have the burden of negating plaintiffs' claims, the moving party does have the responsibility of demonstrating to the court that the standard for summary judgment has been satisfied. *Id.*

Accordingly, this court finds that defendants have not sustained their initial responsibility of informing the court of the basis of its motion, by at a minimum pointing to those facts which they believe demonstrates the absence of a genuine issue of material fact. Further, plaintiffs have requested additional time to do discovery

should this court reach the merits of defendants' motion for summary judgment.

Rule 56(f) provides:

> **(f) When Affidavits are Unavailable.** Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Plaintiffs have submitted the Declaration of Walter R. Schoettle, wherein Mr. Schoettle states that because of the prior appeal of this matter to the Ninth Circuit and because of defendants seeking of summary judgment on the grounds of qualified immunity, plaintiffs have not been able to conduct discovery to respond to a motion for summary judgment on the merits. Plaintiffs state that they seek to depose the defendants in this action, and attached their notice of taking deposition of all defendants which they served on December 20, 1991, to the Schoettle Declaration. On December 23, 1991, defendants filed their motion for protective order seeking to prohibit this discovery. The magistrate judge granted this motion on December 23, 1991.

The court finds that plaintiffs are entitled to conduct discovery as to the merits of their claims against the defendants. The court further finds that plaintiffs have been unable to pursue discovery in this case based on the Ninth Circuit appeal of this court's order granting defendants' motion to dismiss,[17] as well as the petition

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[17] Defendants' motion to dismiss was filed prior to defendants filing an answer in this case. After the issuance of this court's order granting defendants' motion to dismiss, this matter was on appeal to

(continued...)

for certiorari filed by defendants to the United States Supreme Court. Further, on November 18, 1991, the day the Supreme Court denied defendants' petition for certiorari, defendants filed the instant motion seeking a disposition in their favor on qualified immunity grounds. Under these circumstances, the court cannot find that plaintiffs have failed to diligently pursue discovery. The motion for summary judgment is accordingly denied at this time.

IV *Whether Defendants Are Entitled to Absolute Immunity*

Defendants contend that they are entitled to absolute legislative immunity for their spending decisions. Defendants argue that like legislators, they may not be held personally liable for spending decisions that violate the Establishment Clause. *See* defendants' motion at p. 25.

The United States Supreme Court has recognized "absolute immunity" for (1) legislators in their legislative functions, (2) judges in their judicial functions, (3) prosecutors and similar officials, (4) executive officers engaged in adjudicative functions and (5) the President of the United States. Absolute immunity is warranted for these officials because their special functions or constitutional status requires complete protection from suit. *Harlow, supra* at 2732. For executive officials in general, however, qualified immunity represents the norm. *Scheuer v. Rhodes*, 94 S.Ct. 1683 (1974).

In *Scheuer*, the Court held that state executive officials, in a suit for damages arising from unconstitutional action, were entitled only to qualified immunity, subject to those exceptional situations where it is

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[17](...continued)
the Ninth Circuit until the mandate was issued to this court in April 1991.

demonstrated that absolute immunity is essential for the conduct of public business. The reason for so limiting defendants' immunity was that it was not unfair to hold liable the official who knows or should know he is acting outside the law, and that insisting on an awareness of clearly established constitutional limits will not unduly interfere with the exercise of official judgment.

Defendants are accordingly entitled to absolute immunity only if they can show that they come within an exception to the general rule. In this regard, the Supreme Court has recognized that there are some officials whose special functions require a full exemption from liability. *See Butz v. Economu*, 98 S.Ct. 2894, 2911-13 (1978) (executive officials performing adjudicatory functions entitled to absolute immunity). Defendants argue that they are called upon to make spending decisions, and that this special function qualifies them for absolute immunity legislators are accorded in their spending functions, in so far as it is their "functional" tasks that require immunity. *Supreme Court of Virginia v. Consumers Union*, 100 S.Ct. 1967 (1980)

This court does not find that defendants have sustained their burden of establishing that they are entitled to absolute immunity for their actions. The court finds that defendants could receive the requisite protection from qualified immunity, and that this case does not present one of those exceptional situations where it is demonstrated that the official's function requires a full exemption from liability.

V. *Plaintiff's Motions to Strike, To Amend, And For Rule 11 Sanctions*

Plaintiffs have requested leave to amend their complaint to correct any defects the court may find in the pleadings as a result of defendant's motion. As set forth above, the court has found that plaintiff's complaint sufficiently stated a claim for violations of § 5(f) in connection with the use of trust funds to fund the single

referendum issue, and with regard to the transfer of § 5(f) funds into the OHA general fund. Accordingly, the request for leave to amend the complaint is moot.

Plaintiffs' motion to strike defendants' exhibits set forth the entire record in the *Kepoo* case has also been denied as set forth above.

Plaintiffs request that the court issue Rule 11 sanctions against defendants for the bringing of this motion. The court finds the instant motion to be well grounded in both fact and law, and does not find that the motion was brought for an improper purpose. Plaintiffs' motion for sanctions in accordingly denied.

VI *Defendants' Conditional Motion For Stay*

Defendants request that the court grant a stay of the action in the event the court denies any portion of their motion on the basis of qualified immunity, pending the resolution of any appeal they take on this issue.

In *Chuman v. Wright* No. 92-55007 (9th Cir. Mar. 27, 1992), the Ninth Circuit held that the filing of an interlocutory qualified immunity appeal automatically divests the district court of jurisdiction to proceed with trial pending appeal, unless the district court certifies in writing that the appeal is frivolous or waived. This court declines to issue such a certification in this case, and therefore under *Chuman*, all proceedings in this case are stayed pending appeal.

CONCLUSION

Based on the foregoing, defendants' motion for summary judgment is granted in part and denied in part as follows: (1) defendants are entitled to qualified immunity with regard to plaintiffs' claims that they improperly commingled and expended trust funds based on the 1982-1985 OHA operating statements, and (2) defendants' motion is denied on all other grounds.

Plaintiffs' motion to strike, motion to amend and motion for Rule 11 Sanctions are denied.

APPENDIX "C"

No. 92-16462

D.C. No. 88-0773-DAE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NUI LOA PRICE, DR., AKA MAUI LOA, individually and in his capacity as chief of the Hou Hawaiians; THE HOU HAWAIIANS, a native Hawaiian Ohana; KAMUELA PRICE, individually and in his capacity as member of elder council of the Hou Hawaiians, *Plaintiffs-Appellees*,

v.

MOANIKEALA AKAKA; ROD BURGESS; CLARENCE CHING; FRENCHY DESOTO; LOUISE HAO; MANU KAHAIALII; THOMAS KALUKUKUI, SR.; MOSES KEALE, SR.; and KEVIN MAHOE, *Defendants-Appellants*.

Appeal from the United States District Court for the District of Hawaii, David A. Ezra, District Judge, Presiding

Argued and Submitted May 5, 1993--Honolulu, Hawaii

Filed August 23, 1993

Amended November 2, 1993

Before: Alfred T. Goodwin, Thomas Tang and John T. Noonan, Jr., Circuit Judges

Opinion By Judge Tang

ORDER

IT IS ORDERED amending the opinion filed August 23, 1993, as follows:

Delete the following language at slip op. 9015 [App., p. 10a]: "In other words, we are unaware of any law indicating that elimination of the blood quantum requirement would not be for the "betterment of the conditions of native Hawaiians"--one of the five stated purposes of the land trust established by the Admission

Act.[7] To the contrary, established law suggests that amending the blood quantum requirement would benefit native Hawaiians. *See Hoohuli v. Ariyoshi* 631 F.Supp 1153, 1161 (D.Haw. 1986)"

Substitute the following language: "The restriction of section 5(f), incorporating the HHCA definition and confining the "betterment" purpose[7] of the lands trust funds to those of 50% or more blood, remains in place as governing federal law.[8] *See Hoohuli v. Ariyoshi*, 630 F.Supp. 1153, 1160 n.31 (D.Haw. 1986). While actually changing the definition of native Hawaiian contained in the HHCA, or the administration of OHA programs in conformance with a revised definition, would violate clearly established federal law, the Referendum did not do so. The OHA trustees reasonably believed that a referendum to determine Hawaiian opinion on the proper definition of "native Hawaiian" was for the "betterment of the conditions of native Hawaiians" as presently defined. *See Hoohuli*, 631 F.Supp. at 1161 (evidence showed. . . ."

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[7] Section 5(f) of the Admission Act states that the § 5(b) lands ‹shall be held by [Hawaii] as a public trust for the support of the public schools and other public educational institutions, for the *betterment of the conditions of native Hawaiians*, ... for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use.› (Emphasis added). *See also Price v. State of Hawaii*, 764 F.2d 623, 625, (9th Cir. 1985) (‹*Price I*›) (‹Proceeds from the section 5(f) trust are to be devoted to 'one or more' of the five statutory purposes, one of which is 'for the betterment of the conditions of native Hawaiians.'›, *cert. denied*, 474 U.S. 1055 (1986).

[8] Also remaining in place are the restrictions placed by section 4 of the Admission Act on the ‹homelands,› which are not part of the trust administered by the OHA. *See Price I*, 928 F.2d at 826 n.1.

APPENDIX "D"

No. 92-16462

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NUI LOA PRICE, DR., AKA MAUI LOA; THE HOU HAWAIIANS; KAMUELA PRICE,

Plaintiffs-Appellees,

v.

MOANIKEALA AKAKA, ET AL.

Defendants-Appellants.

Filed November 2, 1993

Cathy A. Catterson, Clerk

U.S. Court of Appeals

ORDER

Before: GOODWIN, TANG and NOONAN, Circuit Judges.

The panel as constituted above has voted to deny the petition for reharing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for reharing en banc, and no judge of the court has requested a vote on the suggestion for reharing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

No. 93-1392

Supreme Court, U.S.
FILED
MAR 2 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

DOCTOR NUI LOA PRICE, AKA MAUI LOA, *individually and in the capacity of Chief of the Hou Hawaiians;* THE HOU HAWAIIANS, *a native Hawaiian Ohana; and* KAMUELA PRICE, *individually and in the capacity of member of the Elder Counsel of the Hou Hawaiians,*

Petitioners,

vs.

MOANIKEALA AKAKA; ROD BURGESS; CLARENCE CHING; FRENCHY DeSOTA; LOUIS HAO; MANU KAHALIALII; THOMAS KALUKUKUI, SR; MOSES KEALE, SR; *and* KEVIN MAHOE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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No. _____

In The

Supreme Court of the United States

October Term, 1993

DOCTOR NUI LOA PRICE, AKA MAUI LOA, *individually and in the capacity of Chief of the Hou Hawaiians;* THE HOU HAWAIIANS, *a native Hawaiian Ohana; and* KAMUELA PRICE, *individually and in the capacity of member of the Elder Counsel of the Hou Hawaiians,*

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

1. Section 5(f) of Hawaii's Admission Act, Pub. L. No. 86-3, 73 Stat. 4, 6 (1959), provides in relevant part that the money proceeds of certain lands conveyed to Hawaii upon Statehood and thereafter by the United States shall be "managed and disposed of for one or more" purposes,

including "support of the public schools and other public educational institutions"; "the betterment of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended"; "the development of farm and home ownership on as widespread a basis as possible"; "the making of public improvements"; and "the provision of lands for public use." Congress did not provide any private remedy for enforcing this provision, stating only that the use of the proceeds of these "public trust" lands "for any other object" than "one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide" "shall constitute a breach of trust for which suit may be brought by the United States." *See* 73 Stat. at 6; Pet. for Cert. at 5. "Native Hawaiians," as defined by the Hawaiian Homes Commission Act, include only those "descendant[s] of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." *See* the Act of July 9, 1921, 42 Stat. 108.

2. In 1978, Hawaii's constitutional convention drafted for the voters, and the voters of Hawaii approved, amendments to the state constitution creating an office of Hawaiian Affairs (OHA) to fulfill hopes for self determination by all persons of Hawaiian, *i.e.*, indigenous, ancestry. *See* Haw. Const. Art. XII, §§ 4, 5 (1978). The task of actually assigning to OHA specified revenues, from the public land trust and other sources of public revenue, was not completed until recently. *See Trustees of the Office of Hawaiian Affairs v. Yamasaki*, 69 Haw. 154, 174, 737 P.2d 446, 458, *cert. denied*, 484 U.S. 898 (1987) (holding that amount actually assigned to OHA was undefined and remained a "political question" under state law); Act

of July 3, 1990, ch. 304, 1990 Haw. Sess. L. 947 (purporting to define "manageable standards" for defining revenue).

3. In its structure and day-to-day decision making, OHA is essentially legislative in character. Under the state constitution, OHA is governed by a board of trustees "elected by qualified voters who are Hawaiians," and only "Hawaiians" may be so elected. Haw. Const. Art. XII, § 5 (1978). The board, by constitutional mandate, must be geographically diversified, with five of the nine trustee positions reserved for a "representative" from each of the five largest islands in the Hawaiian archipelago (Oahu, Kauai, Maui, Molokai, and Hawaii). *Id.* All persons of any Hawaiian ancestry may vote in all trustee elections, whether for "at-large" seats or for the "at-large island-representative" seats. Haw. Rev. Stat. § 13D-1 (1985). Trustees are elected to staggered terms (*id.* § 13D-5), and state law provides detailed oversight of trustee elections. *See id.* §§ 13D-3, 13D-4; *id.* (Supp. 1992). The board is empowered to "determine the character of and the necessity for its obligations and expenditures, and the manner in which they shall be incurred, allowed, and paid," Haw. Rev. Stat. § 10-4, to "[m]anage, invest, and administer the proceeds from the sale or other disposition of lands, natural resources, minerals, and income derived from whatever sources for native Hawaiians and Hawaiians," *id.* § 10-5(1) (1985 & Supp. 1992), and to "[f]ormulate policy relating to the affairs of native Hawaiians and Hawaiians, provided that such policy shall not diminish or limit the benefits to native Hawaiians under Article XII section 4, of the state Constitution." *Id.* § 10-5(3) (1985). As construed in *Yamasaki, supra,* Article XII, § 4 of the Hawaii Constitution provides no

judicial cognizable benefits to native Hawaiians; such benefits are defined only by the statutes of Hawaii.

4. This lawsuit was filed below on October 18, 1988, and after an initial appeal, *see Price v. Akaka*, 928 F.2d 824 (9th Cir.), *cert. denied*, 112 S. Ct. 436 (1991), was framed by the Ninth Circuit as an individual-capacity action for damages under 42 U.S.C. § 1983, by a native Hawaiian and others against the members of the board of trustees of OHA in office in 1988. The sole cause of relief pled by the Plaintiffs was that Respondents had violated § 5(f) of the Admission Act by using public trust land revenue for "purposes other than those listed in § 5(f)." 928 F.2d at 826-28. Because the case first went to the Ninth Circuit on a Rule 12(b)(6) disposition which had construed the complaint as pleading claims only under Hawaii law, the Ninth Circuit vacated and remanded for further proceedings, never addressing issues such as Respondents' various immunity from suit.

5. On remand, Respondents moved for summary judgment, asserting, *inter alia*, not only that they were absolutely and qualifiedly immune from suit, but that the summary judgment record failed to reveal a violation of Plaintiff's federal rights at all, and, indeed, that under *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130 (1992), and *Suter v. Artist M.*, 112 S. Ct. 1360 (1992), Plaintiffs did not have standing, or, if they did, § 5 of the Admission Act was not enforceable under 42 U.S.C. § 1983.

6. The particular dispute in the District Court revolved around the so-called "single definition" issue. As noted above, the Hawaiian Homes Commission Act, and, therefore, the Admission Act, create *de jure* racial

classifications of Hawaii's native peoples based on "blood quantum." The legislative history shows that this distinction was sought primarily by non-Hawaiians as a means of limiting the potential benefits of the Hawaiian Homes Commission Act. The "blood quantum" requirement was originally opposed by every person of Hawaiian ancestry to testify upon the original 1921 federal legislation, including Delegate Kuhio. *See* Def. Exh. "O" (Clerk's Record ("CR") 29). The 1978 state constitutional convention asked OHA to determine the propriety of this way of categorizing the indigenous Hawaiian people:

> [I]n looking to the future, your Committee decided that it is of utmost importance to establish a trust entity that would be for all individuals whose ancestors were natives of the area which consisted of the Hawaiian Islands prior to 1778 . . . Although your Committee was tempted to change this outmoded rule from the 1920's [*i.e.* the qualification of blood quantum set forth in the HHCA], the Committee concluded that this responsibility should be assumed by the Office of Hawaiian Affairs.

Stand. Comm. Rep. No. 59, I *Proceedings of the Constitutional Convention of Hawaii of 1978* 643-44. This concern in turn has animated legislation affecting OHA from its inception. *See* Stand. Comm. Rep. No. 784, 1979 Haw. Sen. J. 1351-52. OHA's concern with the so-called "single definition" issue began almost immediately following its establishment, by endorsing, in 1983, elimination of the blood quantum requirement, as debated by the Native Hawaiians Study Commission, *see* 42 U.S.C. § 2991a (1982); Aff. of Linda Kawai'ono Delaney, Def. Exh. "Q" (C.R. 27). In May, 1988, OHA's trustees also proposed to

expend trust land proceeds on a plebiscite on the "single definition" issue. Def. Exh. "R" (C.R. 27). OHA's own attorney opined that such an expenditure would serve "the 'sole interests' " of native Hawaiian beneficiaries of the public land trust, as changing the definition itself could strengthen "native culture, language, and traditions that promote pride in the success of the members of the Hawaiian community," and would "unite the Hawaiian people." *See id.* OHA's attorney pointed to federal judicial precedent in the District of Hawaii, *i.e., Hoohuli v. Ariyoshi,* 631 F. Supp. 1153 (D. Haw. 1986), which had reasoned that, as a matter of economics and practical fact, the "problems of crime, inadequate housing, education, and welfare" were suffered by the Hawaiian community as a whole, and that assisting those of less than half blood would automatically rebound to the benefit of so-called "Native Hawaiians." *Id.* OHA's counsel relied on Congress's expansion of native Hawaiian benefit programs in the Native Hawaiians Study Commission Act, 42 U.S.C. § 2991a, and the Native American Programs Act of 1974, 42 U.S.C. § 2992, 2992c(3), and general principles of native American law that justify the subordination of short-term economic goals in exchange for long-term cultural and political benefits. *Id.* (citing *Santa Clara Pueblo v. Martinez,* 436 U.S. 39 (1978)). While the Department of the Attorney General of Hawaii originally opined that "the use of funds derived from the ceded land funds to advocate a change in the law to provide for a single definition is not a use solely for the betterment of conditions of native Hawaiians," *see id.,* the Department of Attorney General, on July 28, 1988, abandoned this position, stating that "it is not improper to expend special fund

moneys to merely disclose (inform) to and gain the input of OHA's native Hawaiian beneficiaries on various matters (e.g. the single definition)." *Id.* Thereafter, referendum ballots were distributed, informing OHA voters that the dual-blood-quantum system had treaded upon "traditional Hawaiian values of identity and affection," and that "[i]n another fifteen years, more than 70% of our population will be excluded from current trust benefits." Def. Exh. "O" (C.R. 27). The ballot packet noted that native Hawaiian culture did not draw blood quantum distinctions, a fact embodied in the term "Na Oiwi" which described as "family" those "of the same bone." It stated that the dual definition was adopted by Congress over the protests of native Hawaiian witnesses and Delegate Kuhio, and was part of "the 'divide and conquer' motives of Island sugar planters." *Id.* The ballot packet also observed that congress had refused to adopt the blood quantum requirement in recent legislation, and that those of 50-percent blood would continue to receive preferences, if the definition were changed as OHA proposed, based on need, and that, in any case, only the Legislature (or Congress, with respect to the unique benefits of the Hawaiian Homes Commission Act), could alter the requirement. *Id.* Of those who participated in the referendum, at least 66 percent of native Hawaiians supported a "single definition." Aff. of K. Brian Doty; Def. Exh. "N" (C.R. 27). As early as December 23, 1988, in a related state court suit styled *Kepoo v. Burgess*, No. 88-2987-09 (Haw. 1st Cir. summary judgment entered 1989), *aff'd mem.*, No. 14770 (Haw. June 24, 1991), a Hawaii state trial court had already denied preliminary relief to block the referendum, stating:

> 7. The evidence did not show that the actions of Defendants in posing the issue of the Single Definition would dissolve the Public Land Trust, would diminish or limit the benefits of native Hawaiians, or would not be for the betterment of conditions of native Hawaiians.
>
> 8. The evidence did not show that the actions of the Defendants in distributing ballots on the referendum would dissolve the Public Land Trust, would diminish or limit the benefits of native Hawaiians, or would not be for the betterment of conditions of native Hawaiians.

Def. Exh. "P" (C.R. 27). Hawaii Circuit Judge Milks reasoned that "[t]he betterment of the conditions of native Hawaiians can be achieved in many ways," and that "[p]rograms such as the Single Definition Referendum that promote self-determination [are] one of many ways to achieve the betterment of the conditions of native Hawaiians even though all Hawaiians would benefit." *Id.* She found, further, that the dual definition was properly found by Respondents to have been, and to remain, " 'contrary to Native Hawaiian culture and tradition and was a requirement developed and approved by those with no native Hawaiian blood.' " *Id.* A second Circuit Judge, and now Associate Justice of the Supreme Court of Hawaii, granted summary judgment for Respondents in the *Kepoo* action, and the Hawaii Supreme Court summarily affirmed that judgment.

7. In the federal suit underlying the instant petition, United States District Judge David Ezra denied Respondents' motion for summary judgment, and Respondents immediately appealed under the collateral order doctrine, *see Mitchell v. Forsyth*, 472 U.S. 511 (1985), the denial at the

summary judgment stage of their claims of absolute and qualified immunity from suit under 42 U.S.C. § 1983. *See* Pet. App. "A." The Ninth Circuit reversed the denial of qualified immunity, finding first that this Court's decision in *Lujan v. Defenders of Wildlife* did not alter Petitioners' standing, and that this Court's decision in *Suter v. Artist M.* did not affect Petitioners' ability to sue under 42 U.S.C. § 1983. *See* Pet. App. 6a-12a. The Ninth Circuit rejected Judge Exra's reliance on certain aspects of state Attorney General opinions as establishing "clear law" on the alleged federal duties at issue, and pointed to such authorities as Judge King's ruling in *Hoohuli v. Ariyoshi, supra,* Judge Milks' analysis in *Kepoo v. Burgess, supra,* and the report of the state constitutional convention, as ousting any claim for damages. Thus, the Court of Appeals held, "[t]he OHA trustees reasonably believed that a referendum to determine Hawaiian opinion on the proper definition of 'native Hawaiian' was for the 'betterment of the conditions of native Hawaiians' as presently defined." Pet. App. 40a.

REASONS FOR DENYING THE WRIT

1. The Ninth Circuit's disposition below constitutes an absolutely correct application of the doctrine of qualified immunity, and presents no question warranting this Court's further review in this regard. Indeed, this is true several times over, in that, in addition to the grounds relied upon by the Court of Appeals, it was unclear, during the years at issue, whether a "disposition" to OHA was terminated all federal supervision over the public trust land funds at issue, and, in any event,

whether OHA's actions, even if violative of OHA's state law duty to its Native Hawaiian beneficiaries, could still be justified with regard to any federal duties on the basis of the "public use" clause of § 5(f) of the Admission Act. *See Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 242-43 (1984). As this Court emphasized only days ago, qualified immunity is not "defeated where a defendant violates *any* clearly established duty, including one under state law," but, rather, only when a "clearly established . . . federal right" is implicated. *Elder v. Holloway*, 62 U.S.L.W. 4149, 4151 (U.S. Feb. 23, 1994). Insofar as the Ninth Circuit's decision relies on Judge Milks' post-election findings in *Kepoo*, this Court has also found such post-act decisions potentially "relevant" to immunity analysis. *See Caspari v. Bohlen*, 62 U.S.L.W. 4113, 4117 (U.S. Feb. 23, 1994) (immunity of state court judgments in federal habeas review). No serious attack on the Ninth Circuit's judgment is raised by the Petition, which devotes most of its pages to discussion of matter not properly raised anywhere in the courts below.

2. If there were any basis for reviewing the qualified immunity determination of the Court of Appeals, the Court would likely affirm in any event on the grounds of absolute immunity. *See Lake Country Estates v. Tahoe Planning Agency*, 440 U.S. 391, 403-04 (1979). Absolute legislative immunity "is equally applicable to federal, state, and regional legislators," *id.* at 405, and the immunity applies even to officers of the executive or judicial branches of state or local government "when acting in their legislative capacity." *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 734 (1980). Here, Respondents were, insofar as Petitioners questioned their activities in the

District Court, seeking, in a fundamental way, to communicate with their constituents. Certainly Congress does not forfeit its immunity in enacting spending bills to pay for committee hearings, investigations, and the like, and Petitioners have no good claim for relief under 42 U.S.C. § 1983 for this reason.

3. Respondents' position before the Court of Appeals was that that court had no jurisdiction under the collateral order doctrine to consider the question of Article III standing, or the ability to sue under 42 U.S.C. § 1983. *See Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 500 (1989). Because the Ninth Circuit correctly resolved the immunity issue, and its view of the other issues in the case may properly be viewed as *dicta*, we see no reason to grant review to address the propriety of the Ninth Circuit's construction of this Court's decisions in *Lujan* or *Suter*. Moreover, if the Court were to agree with the Court of Appeals that the issues of standing and ability to invoke § 1983 were necessary to resolving the qualified immunity and absolute immunity issues in this case, that complication would militate against, rather than for, granting review here, as those issues themselves are independently important and having prompted a division of opinion, if the Ninth Circuit's ruling here is law of the circuit (particularly with respect to the impact of *Suter*), with other courts of appeals. *See Resident Council of Allen Parkway Village v. HUD*, 980 F.2d 1043, 1051 (5th Cir. 1993); *Stowell v. Ives*, 976 F.2d 65, 68 (1st Cir. 1992). There is thus no basis for granting review here.

CONCLUSION

For the reasons above, certiorari should be denied.

Dated: Honolulu, Hawaii, March 2, 1994.

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